DOCUMENT RESUME

ED 084 668 EA 005 647

TITLE	Suing the Schools for Fraud: Issues and Legal Strategies. Transcript of a Conference: Fraud in the Schools.
INSTITUTION	George Washington Univ., Washington, D.C. Inst. for Educational Leadership.; Lawyers' Committee for Civil Rights Under Law, Washington, D.C.; Syracuse Univ. Research Corp., N.Y. Educational Policy Research Center.
PUB DATE	Mar 73
NOTE	150p.; Papers presented at Educational Staff Seminar (Washington, D.C., March 9, 1973)
EDRS PRICE	MF-$0.65 HC-$6.58
DESCRIPTORS	*Court Litigation; *Educational Accountability; Elementary Schools; Legal Responsibility; *Reading Level; *School Districts; Secondary Schools; *Student Rights
IDENTIFIERS	Fraud; *Tort Liability

ABSTRACT

On November 20, 1972, a complaint was filed by Suzanne Martinez of the Youth Law Center against the San Francisco Unified School District and others on behalf of an 18-year-old plaintiff, identified as Peter W. Doe. Peter Doe had graduated with average grades, had never encountered serious disciplinary problems, and had maintained a regular attendance. Reading specialists who examined the plaintiff after his graduation from high school indicated that he was reading at the fifth grade level. The plaintiff later subscribed to reading tutoring and made significant progress. The complaint presented nine legal grounds of school district liability in the four general areas of negligence, misrepresentation, breach of statutory duties, and constitutional deprivation of right to education. At the conference recorded here, Ms. Martinez and a number of educational experts discussed the case and its implications for the future of litigation in this area. (Author/JF)

FILMED FROM BEST AVAILABLE COPY

ED 084668

U S DEPARTMENT OF HEALTH
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

SUING THE SCHOOLS FOR FRAUD: ISSUES AND LEGAL STRATEGIES

Transcript of a Conference: Fraud in the Schools

Co-Sponsored by:

Educational Policy Research Center
Syracuse University Research Corporation
1206 Harrison Street
Syracuse, New York 13210

Educational Staff Seminar
Institute for Educational Leadership
The George Washington University
Suite 620, 2000 L Street, N.W.
Washington, D.C. 20036

Lawyers Committee for Civil Rights Under Law
The Woodward Building
733 15th N.W., Suite 520
Washington, D.C. 20005

Held at the Mayflower Hotel, Washington, D.C. on March 9, 1973.

EA 005 647

This is produced for private distribution and without benefit of formal review by the Educational Policy Research Center at Syracuse. The views contained herein are not necessarily endorsed by the Center, its staff, or its contracting agencies. This draft is not for quotation or reproduction in any form without expressed written permission. Copyright © 1973 by the Educational Policy Research Center.

"PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY

SURC

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE NATIONAL INSTITUTE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER"

Editor's Note: For the convenience of the reader, an ➧ precedes cogent ideas basic to the discussion of the day.

TABLE OF CONTENTS

Preface by Stuart A. Sandow, Associate Director of The Educational Policy Research Center	i
Introduction of Speakers	1
Susanne Martinez, Attorney for the Plaintiff	3
Discussion	9
Frederick McDonald, Director of Educational Studies at The Education Testing Service	31
Discussion	47
Haskell Freedman, Judge of Probate Court, Massachusetts and former General Counsel to Massachusetts Teachers Association	69
Discussion	85
Thomas Green, Co-Director of The Educational Policy Research Center	91
Discussion	103
Harry Hogan, Director of Government Relations at Catholic University	115
Discussion	125
Appendix	

PREFACE

In November of 1970 the staff of the Educational Policy Research Center of the Syracuse University Research Corporation began to speculate on the effects of developments in two areas, one in education and law and one in educational practice. The first was the implications of the Marjory Webster case: where federal anti-trust law was applied to educational institutional arrangements. The second was the emerging rhetoric of accountability in popular and scholarly journals. We felt that this rhetoric would result in a broad and intense discussion of product vs. process in education.

Our speculation on these events lead us to forecast a case of fraud emerging in the educational arena. Based on this forecast we surveyed 200 individuals in the fields of law, school administration, government and universities. One of the fundamental conclusions by 80% of the respondents was that a case of fraud would emerge and succeed within five years.[1]

In November of 1972 we were notified that a complaint would be filed by Susanne Martinez of the Youth Law Center against the San Francisco Unified School District, et. al. In this complaint Ms. Martinez acting for the plaintiff, Peter W. Doe, detailed nine specific causes of action. (See Appendix B)

We at the Center felt a responsibility to our constituents at the local, state and federal levels to brief them about the suit. Discussions with Steve Browning of the Lawyers Committee for Civil Rights Under Law and Sam Halperin of the Educational Staff Seminar of the George Washington University, led to an agreement to co-sponsor a conference early in March of 1973.

---

[1] Stuart A. Sandow, Emerging Educational Policy Issues in Law, Volume I: Fraud. Available from the Educational Policy Research Center, 1206 Harrison Street, Syracuse, New York.

The Conference was held at the Mayflower Hotel in Washington. Participants were lawyers, educators, state and federal government representatives and school administrators. These participants were invited not only as experts in their respective fields, but also as representatives of the varied positions that will be taken on the suit in the legal and education communities. EPRC selected and invited the speakers who included: Susanne Martinez, attorney for the plaintiff; Frederick McDonald, Director of the Educational Testing Service project to design an accountability system for New York City; Tom Green, a prominent educational philosopher; Haskell Freedman, a probate judge and former counsel to the Massachusetts Teachers Association and member of the Board of Directors of the National Organization for Legal Problems in Education; and Harry Hogan, former counsel to the House Special Subcommittee on Education and now Director of Government Relations at Catholic University.

EPRC arranged for the transcriptions of the proceedings and the editing of this report into a useful case book for all interested people. The Educational Staff Seminar agreed to absorb all expenses incurred by the speakers and to provide the conference facilities and catering. The Lawyers Committee for Civil Rights Under Law held a pre-conference session with the speakers and interested lawyers to critique and aid in the development of a successful complaint. (This session is referred to as the night sessions throughout the transcript.)

The general concensus of the attendees was that much was gained by the discussion of an issue that will not be dealt with in research reports and other documents, but will be decided in the courts. There was also general agreement on the importance of the conference for the complaint and its subsequent revision.

For your information, conference documents have been appended to this document. They include: a list of the participants, a summary of the complaint and a folder describing the Fraud study.

We at EPRC would like to thank everyone who helped insure the success of this conference and a special thanks to Steve Browning and Sam Halperin for their valuable time and excellent advise.

We solicit any and all comments about this transcript. We would also appreciate hearing from the reader about what actions are pending in other states in relation to this issue and would welcome any suggestions for further conferences on other issues you feel may surface in the courts of interest to the educational community in the U.S.

Stuart A. Sandow
March 1973

PROCEEDINGS

MR. HALPERIN: We are late in getting started. We will try to make up time by doing without diffuse and unnecessary introductions.

I am Samuel Halperin of the Educational Staff Seminar. We are very pleased to be one of the three co-sponsors of today's meeting. The Educational Staff Seminar is an in-service professional staff development program for men and women who work full-time in the field of education in the federal government. Recently, we have been exploring ways to work with officials in the states as well.

What we try to do in the program is to introduce federal officials to issues that they are going to have to grapple with, to programs, to processes of education in the field. The idea man behind today's program, Stuart Sandow, came to us with the notion of this conference on fraud, on the accountability in the schools, and we were delighted to join in co-sponsoring this program.

Jonathan Brown, the assistant director of the program, is here. I will be here. If there's anything we can do to make your stay in Washington more effective and advantageous, please let us know.

I would like only to ask Steve Browning to stand up and show himself. Steve Browning, as you know, is the head of Lawyers Committee for Civil Rights Under Law. Steve is also one of the co-sponsors of today's program.

The ideas and the real initiative, as I said earlier, and practically all of the work done for this conference was done by Stuart Sandow of the Educational Policy Research Center at Syracuse, and I'd like to turn it over to him now.

MR. SANDOW: Good morning. Thank you for coming. The five speakers are Susanne Martinez, Fred McDonald, Haskell Freedman, Tom Green and Harry Hogan.

The Educational Policy Research Center's interest in this issue is wider than the case itself and we tried to put on the platform today people who were concerned with various apsects of the greater issue at hand.

One of the issues is that of a system of education with problems emerging only as a result of its extraordinary success in striving to serve everyone with quantitatively described goals.

The second issue is that of non-linear cost increases and the technical difficulties of trying to serve 100% of all children. We are now at the point where the majority are being served.

The third issue is that of the changing metaphors that are adopted, and come to affect the educational leadership in the United States.

The fourth is the issue of responsibility, and that the schools are shifting in their attitudes toward responsibility, from a responsibility for equal access to a responsibility for results.

The last is the idea of an issue of a mature system, no longer a growth system, demanding wholly different management talents and management strengths and management attitudes for the educational system.

Procedurally, each speaker will make their addresses, which are not formal speeches or we would just distribute them and get on with the discussion. We will then take questions.

The proceedings are being transcribed and you will have an edited transcription within three weeks, so you needn't worry about taking notes and we would much rather you participate.

PRESENTATION BY SUSANNE MARTINEZ, ATTORNEY FOR
THE PLAINTIFF: "HISTORY OF THE ACTION -
PRESENTATION OF REVISED COMPLAINT"

MS. MARTINEZ: I'd like to apologize first. I suffer from both a cold and a jet lag, so I hope you can understand what I'm saying today.

I'd like to first talk in some general terms about the legal aspects and implications of the case, and then I'd like to talk more specifically about what this particular case is doing and what it says.

The concept of using the courts, the judicial system, to affect public education is something which has been growing the last few decades and I know all of you are very much aware of the kind of judicial decisions which have come down; for example, integration decisions, the more recent school financing decisions, the access to education cases involving exceptional children, mentally retarded children, and other children with special needs who have been excluded from the educational system.

There's no question that these kinds of actions have had a tremendous impact upon the educational systems. What I think is different about the kind of case that we are talking about today and these types of civil rights actions is that this kind of a case offers a unique opportunity to focus in on, not merely the outside kind of elements which make up the educational system, but the very process of education itself.

It is not a First Amendment case. It is not an access to education case. It is not a civil rights action. It is an action which looks to the product of education and says that the system has somehow failed and that the system should be held accountable for it.

In some ways, the case has been described as a landmark case,

a revolutionary case; and in some ways, it is. Another perspective of looking at it is that it is really somewhat of a traditional legal model that's being applied to the educational system; and what I mean is that most of the educational reform cases which have come about in the last few years have been, for the most part, based upon broad constitutional envisions. The suggestion of equal protection violations, due process violations, and these concepts, although they have had some specificity in the kind of decisions that have been made, still remain somewhat of a broad changing kind of principles.

The kind of case that we are involved in today, rather than being a constitutional thrust of the action, although there is a constitutional theme in it, most of the legal arguments rely on what are very traditional, very conventional legal theories of negligence, tort liability. So in that sense, the case is not as revolutionary as the idea of applying the constitutional provisions to the system of education.

In the same sense, the idea of applying negligence principles to the educational process is not new, either. The past century has seen a broadening of the concept of filing suits against the state and holding the state liable for its tortus conduct.

In the federal system, in 1947, the federal tort case claim law was adopted, which for the first time subjected the federal government to liability. In California, a similar statute was adopted in 1963. However, 40 years earlier, the California Legislature had adopted a provision in the California Education Code which held the school districts would be liable for negligence and they made the school district one of the few institutions at that time which a citizen could file an action for damages against.

Many people viewed that kind of negligence simply in the area of school truancy of students and saw it as a very common law type of negligence. In fact, the earlier cases involved, in some instances, actual intrusion into the area of teaching.

For example, in 1933, a case was brought contending that a teacher should be held liable for damages for having failed to make certain education decisions as to the instruction, decisions as to the ability of a student who was participating in a physical education. Of course, I think in that case, the damages were for injuries to the student who was required to perform a task which was above her abilities.

In this case, we are talking about a different kind of damage. We are talking about damage which you can't see. There's no broken arm. There's no property damage. It's certainly a much less visible kind of a damage, but still a tangible damage.

There are a few more thoughts I'd like to suggest as far as the concept of using a tort liability against a school district. While this case is undoubtedly the first which seeks liability for failure in educational process, the history and direction of tort liability in this country is towards an expansion. We've seen it go in the last 50 years from a policy of sovereign immunity, no liability of the state, to liability on certain terms, and expanded statutes and decisions of law affecting liability of state institutions.

Within the area of torts alone, you can see an expansion from the kinds of harm which 20 years ago were not considered damage. For example, the tort of invasion of privacy is something we have seen only in the last 10 or 15 years. The concept of awarding damages for damage such as mental distress is something which, again, we have only seen developed in the last few years, and the trend has, in all instances, been towards an expansion of liability rather than a protraction; and I think when you look at this case you have to view it in terms of this kind of expansion and increased liability of the state.

With those remarks, I'd like to focus in more specifically on the complaint which was filed. I think you all have the materials which were passed out to you. It's a brief summary and I expect

many of you have not had a chance to read it over, so I will attempt to run down through some of the basic operational facts of the case and then some of the major legal theories which are involved.

The case involves a young man who is designated as Peter Doe. He's an 18-year-old, white, middle-income young man, who graduated from high school in San Francisco in 1972. During the course of his school years in California, between the ages of 6 and 16, he was subject to compulsory attendance laws. He attended an elementary school, a junior high school and senior high school, all in the San Francisco School District.

During the course of time that he was enrolled in the San Francisco School District he was never held back a grade. His grade point average upon graduation was slightly above a C average. He was never what is commonly referred to as a discipline problem. He had no record of expulsion or suspension or particular difficulties in that area at all. He's also a student who has a regular attendance record.

He passed, I think it's fair to say, from year to year through the San Francisco school system without any particular difficulties. He was given periodic state required tests. Those test scores reflected achievement in reading, arithmetic and various other areas. In all cases, these tests were placed in his records. They indicated that his performance was, in almost every case, in the bottom quartile of the school, particularly in his reading ability.

He graduated. He was given a high school diploma. After graduation, he was privately tested by two reading specialists in San Francisco who came to the independent conclusion that he had a fifth-grade reading ability.

Subsequent to graduation, he was placed under a private tutor, a reading tutor, and he has made in the past seven or eight months considerable improvement in his reading ability. We have not had

him retested at this time but there's a suggestion that he's gained probably two grade levels in the last seven or eight months under this kind of instruction.

If you turn to your summaries, the complaint has basically nine causes of action. For those of you who are unfamiliar with legal terminology, a cause of action is basically a legal theory upon which a plaintiff seeks to recover. The causes of action, although there's nine of them, really break down basically into four major thrusts of the case.

The first is a count of common law negligence. In a very brief sentence, this is based on the contention that the school district had a duty which it owed to the plaintiff and that through various acts and omissions by the employees and agents of the school district that that duty was breached and that reasonable care was not exercised and that the plaintiff was damaged as a proximate cause of those acts and omissions.

The second count is, again, a common law action based upon misrepresentation. The complaint contends that the school district misrepresented to the young man's parents his abilities and his educational progress and that, because of their failure to let his parents know that he was unable to read, that he was reading at a fifth-grade level, the parents were unable to seek out whatever kind of help they might have been able to bring to bear upon his problems.

The next few causes of action are categorized basically under the general framework of statutory claims. In California law, under the tort liability claim, a state agency can be held liable for its failure to carry out a statutory duty. These causes of action cite various statutes in the State of California which we contend establish a duty on the part of the school district to do various things. They represent some of the common law negligence claims in the sense that they say--and misrepresentation--that the statutes impose certain duties upon the school district to give parents information

as to a student's progress, to establish certain standards before students are given diplomas and proficiency standards and basic skills, and to establish educational systems which will have the effect of turning out students with these skills.

The last cause of action is based upon a constitutional claim that the young man has a constitutional right to education and that by the acts and omissions of the school district he was denied these rights.

Quite briefly, that is a rundown of the various aspects. I think that it's very important to look at this case and consider the facts involved in that you view it in terms of perhaps the first of what would be undoubtedly a series of cases of this type brought on different factual allegations, sometimes brought on different legal theories, sometimes brought for different kinds of relief; and, in that sense, Peter Doe is simply a forerunner of an effort on the part of parents and citizens to bring to focus through the judicial system attention upon the fact that the schools--the educational systems in this society have failed in some way to provide the Peter Does of this country with the kind of education to which they are entitled.

I think that we all have to recognize that Peter Doe is certainly not an exceptional case. He is one of thousands and probably hundreds of thousands of children who are in schools in this country who are passed through the school systems from year to year and to whom the state has never provided that kind of education which we would hope that they would leave the systems with.

With those remarks, I would like to open it up to any kind of questions that you or any of the panelists may have as to any specific areas which you would like to hear me discuss further.

DISCUSSION

QUESTION: I have two questions. What specifically does the diploma say? What tests were used by the reading consultants to determine the reading proficiency of Peter Doe?

MS. MARTINEZ: I have not examined the diploma, but having seen the San Francisco diplomas, I think I can simply say that he was graduated in high school in San Francisco. He was issued a high school diploma.

QUESTION: It doesn't say anything like he has satisfactorily achieved the requirements for graduation?

MS. MARTINEZ: It probably says that. I'm afraid I can't answer the question. I think that you have to look at the question and the answer in terms of what a high school diploma generally means in our society and you have to look at the kinds of considerations that people give to the issuance of a high school diploma.

There are many occupational fields which are cut off from individuals who do not have a high school diploma. There are other disabilities that people who don't have a high school diploma suffer. It raises an interesting question: whether these kind of barriers are legitimate if, in fact, high school diplomas are issued irrespective of achievement. In the sense that if a high school diploma doesn't mean some standard of accomplishment or ability, then, query, whether they sould be used as barriers; and that brings the case into some kind of broader societal implications.

With respect to your second question on the specific tests, there were several tests given and I don't recall the specific names of them at this time. I believe the Gates Test was one, and several other batteries of tests.

QUESTION: I have two questions related to that. When you

have to show the plaintiff had improved otherwise, how would you be able to show that the school system could have done this? Then, if the plaintiff does improve, wouldn't that have some bearing on the damages involved?

MS. MARTINEZ: I think that the case is enhanced by the fact that in this particular instance we have proof that he is educable and he can be taught.

QUESTION: But that's my question. For anyone else, would they actually have to show that the plaintiff had in fact improved after leaving school?

MS. MARTINEZ: Well, the importance of using that is it demonstrates that he really was harmed. Because you have a student, for example a mentally retarded student, who leaves the school district with fifth-grade reading ability, that certainly doesn't suggest that someone harmed him because he couldn't reach the twelfth-grade level.

We are certainly not contending there's any responsibility of the school district to bring every student up to some standard of proficiency, but where there is ability on the part of the student and where there are acts of the school districts, negligent acts which can be pointed to which would demonstrate the school district has in fact done something wrong, combined with the example of the student being able to achieve would establish the test.

QUESTION: Well, you really weren't responsive to the first one.

MS. MARTINEZ: Your question is, I guess, if we don't show that he can be educated, do we lose? Is that basically your contention?

QUESTION: It's not a contention. It's a question. What's the test of whether the school system could have done better, I guess is what I'm saying.

MS. MARTINEZ: I think you can look at it in terms that you can show it by various ways. The easiest way, in my opinion, is to show it by the fact that someone else could succeed with him. I don't necessarily say that's an essential element, but in the kind of case that we've brought, as opposed to some other legal posture, I think it's essential.

QUESTION: Won't the school district contend that under private tutelage he was able to achieve, but the school district had not sufficient resources to provide this one-to-one tutoring?

MS. MARTINEZ: I can answer that in two ways. First of all, he may need the private tutoring at this point because of the fact that he's now out of school and he has to make rapid improvement in a short span of time and private tutoring on a one-to-one relationship is probably the easiest way for him to do that without having to spend another five or six years in a group situation.

In part, that reflects upon what resources the school district did have available and did they make decisions whether to use those resources as far as this individual is concerned; and one of the basic contentions that we have is that the school district in this particular instance did not make those kind of discretionary decisions as to what kind of resources they could have when he was in elementary school. The school district did have various remedial reading courses which they could have offered him, but those kind of decisions were not made because the school district did not inform itself or utilize information that it had available in his records as to what he needed.

QUESTION: Did the test while he was in school show that he was below his grade level?

MS. MARTINEZ: Yes. The California State has a number of tests that they give at intervals and those kind of tests, including the Gates Test and a variety of other California tests--those scores

were recorded in his files for any teacher who was interested in seeing them. There was an indication of what level he was reading at.

QUESTION: And he was below his grade level?

MS. MARTINEZ: Yes. He showed he was in the bottom quartile.

QUESTION: Is the bottom quartile below the grade level?

MS. MARTINEZ: Yes, several grade levels below.

QUESTION: Could you broadly outline specific acts and omissions he claimed were negligently committed by the school board?

MS. MARTINEZ: I can give you a couple of examples of the kinds of actions that occurred to this young man, and by examples, I don't mean to suggest they are limited to these few examples because we are covering the course of 12 years in which he was in the school district.

In the 11th grade, the young man's reading ability was below the fifth-grade level. He was given a textbook which his teacher indicated to his parents was designed for students in junior college. His mother asked, Why are you giving my son a textbook at the junior college level when he obviously can't read at high school level? The teacher's response was, "Well, I like the material in the book and I know he can't read it, but I like what's in the book."

Another example: In the 10th grade, his mother was concerned about his reading ability. She went in to see his counselor. In the San Francisco school district, we don't necessarily have full-time counselors. They are all teachers that teach classes and counsel part-time. This man was a vocational education teacher who was also counseling academic students. His mother asked, "What's the most recent reading test which was given to my son? What's his

reading level?" He said he didn't have that information. He apparently had not been present for the most recent, year-before test.

She said, "Will you please test him? I'm very concerned about what he's doing. I don't think he's understanding anything that he's receiving in his classes." The counselor said, "We'll have him tested next week." The mother contacted the counselor the next week and she was told he had been given a reading test and that his reading ability was average, that he was reading at about the ninth-grade level.

The mother questioned the young man as to what kind of test he was given and he advised her that the counselor had called him into the office and asked him to read a paragraph in a book and on the basis of that paragraph he was told he was reading at average ability. In fact, the counselor didn't have the competency to make that kind of judgment; that he was, in fact, reading far below that; and the school agent took upon himself the responsibility to perform that kind of function.

QUESTION: I'm not sure I understood the answer to the question a moment ago. It seems to me a key question. That is, if the school district could prove that its resources then in operation were not sufficient--for example, if its remedial program was available only to children in the bottom 10 percentile on reading scores, do you think that the lack of resources would be a defense?

MS. MARTINEZ: I think you first have to make the assumption that decisions were made as to what to do with him, whether the resources were utilized. Again, this particular action is limited to these facts because I think there are other kinds of actions which could contend the school district should have allocated resources in this matter. In this particular case, we are contending that they didn't make those decisions, that they had available resources and they did not make a decision as to whether he should be in them or not.

QUESTION: But if they can disprove that allegation, then you don't have a case.

MS. MARTINEZ: Well, I wouldn't go that far. I think that one of the strong points is our allegation that they didn't make those decisions and failed to exercise discretionary action as well as improper types of discretion, but I don't think that answers the second statement that I made, that if, in fact, they did make a decision and the decision was inappropriate and they did have available resources which they could have properly allocated, then that would also be a type of action which we would contend they should be held liable for.

QUESTION: You keep stopping short of the question. If they can prove that they made a decision --

MS. MARTINEZ: No. I went farther than that. If they made a decision and if it was an improper decision--improper in light of the kind of facts that existed as to this young man and the kind of decisions which professionals--the standards of educational professions were such that the decision was unreasonable and they did not make the proper decision, it's our contention that that would be liability.

QUESTION: When do you think the case will be heard and what do you think your odds are?

MS. MARTINEZ: At this time, the complaint has not yet been served on the defendants. We anticipate that we will be amending the complaint to more specifically specify some of the allegations and that we will serve it probably within the next five or six weeks.

Under California law, the defendants then have an opportunity to answer the complaint within 30 days. They will probably file what is called a demurrer in California, which challenges our right to bring the action, and I expect that the case will go up on appeal and the outcome of the case, given the time lag in California

cases, could be two years or even more.

QUESTION: What's been the spinoff effect of this in the legal community in California, which I'm sure you probably know best since it's your area of operation? Are there other cases involved? Are there other cases in motion? Are there other considerations for cases along the same lines or parallel lines but on different issues?

MS. MARTINEZ: I can't respond very specifically because I'm not aware of anyone who is immediately about to file a suit, but I do know that there's--it certainly has raised a considerable amount of attention among the educational lawyers in the country and I have been contacted by attorneys in a number of other states who are contemplating similar actions, and I anticipate that there will be a number of cases filed within the next few months in various states under various state laws which will be similar in the sense that they will look at the end product of education and seek some kind of changes through the judicial process.

QUESTION: Just to follow up quickly, at the moment, there is no case taking place in California where other specific legal action is being taken?

MS. MARTINEZ: Not that I'm aware of.

QUESTION: Coming back to the question raised before about what was on the diploma, I assume that the San Francisco Unified School District is chartered by the state. What does the charter say as being the responsibility and authority of the school district as to the educational achievement levels of the students? Is it pretty hard and fast, saying the major obligation is education, or just the opportunity for education or what-have-you?

MS. MARTINEZ: Well, the California Education Code, with respect to graduation, has some specificity. They provide that the state board of education is required to set up minimum standards

for graduation in the school districts and then the school districts are supposed to adopt or conform to these. The state board of education has adopted standards for proficiency for graduation which would require that the school district not award diplomas to students who do not have reading ability to the eighth grade level or have demonstrated similar incompetence through reading courses.

Now, in fact, that statute has been amended since the filing of this suit. It was amended in such a way as to make it clear that the eighth-grade level was not a mandatory level; it was simply a model that the state board of education has put out. I want to explain, partly, the reasons I heard that the statute was amended. I'm told it was not in response to the lawsuit; that, in fact, some of the conservative members of the California Legislature were so embarrassed by the fact that the state board of education had set the standards for proficiency at the eighth grade for twelth grade graduation that they didn't want the school districts to aim for that lower standard, and there are hearings that are to start taking place in California in the next six weeks or so to attempt to establish new standards for the state.

QUESTION: I'm not clear about a factual statement. On the one hand, you say the parents were concerned at various points during the student's career about his reading ability. I also thought that you indicated that in the student's files there was indication that he was reading below grade level. Was that just at the end of his career? Are you saying that throughout his entire career it was true and that it was not until his high school period that the parents had any indication from the school that he was a deficient reader?

MS. MARTINEZ: No. His records reflect at the beginning years of school attendance that he was performing at that level or above, in the first grade and second grade. As he progressed through the system, his achievement fell. The longer he stayed in the school, the farther behind he got; and that's not an uncommon situation in

San Francisco. The reading scores for the whole district showed that the longer they stayed in school, the worse they performed.

The test scores which were in the files were never transmitted to the parents. The parents were unaware of the fact that those files contained that kind of information. They relied upon representations made by the school district that he did not have any particular handicap. They felt--particularly his mother--they felt an instinctive feeling that there was something wrong. This was why she initiated, during high school, a number of attempts to find out information from the teachers. In all cases, they were all parents-initiated. There were no instances of the counselor coming in and saying, "We think he has a problem." She observed that the boy appeared not to be reading or learning.

QUESTION: How did the suit start? How did they come to you to file the lawsuit?

MS. MARTINEZ: The mother, I think you can describe, as the prime mover behind the lawsuit as opposed to the student himself. She accepted the fact that she thought he was just an average child based upon statements the counselors had made to her until he graduated. Then she did have him tested and she found out he was at fifth-grade reading ability and she became very upset about the school system and wanted some kind of action taken against them. She went to a private attorney and filed a damage claim against the school district.

The private attorney then referred her to us, to our office, because we specialize in educational law, and it was his feeling that he could not carry the burden of the research.

QUESTION: You mentioned that the plaintiff was in the bottom quartile for the school throughout most of his school career in terms of grade scores. I have two questions. What is the grade level differential between the bottom quartile and the school, since

that's a relative measure; and the second question is, was tracking or grouping in any way utilized so that his performance might have been at or above the mean for his class?

MS. MARTINEZ: Some of the tests--most of them--reflect a quartile-type of relationship. There are some at grade levels as opposed to a percentage thing, and those tests all reflect him being three or four grade levels below what he should be at.

What was the second question?

QUESTION: The tracking.

MS. MARTINEZ: San Francisco schools "do not track." They do, in fact, track. He was in the academic track, not a vocational track, and within those tracks it's stated there was no "x, y, z" level. In fact, I suspect there is, and I think he was probably in the lower track, but that's a fact which can't be proved or disproved.

QUESTION: Maybe I should make it a little more specific. What would be his level of performance relative to his classes, or do you know that? You refer to it in terms of the school as a whole.

MS. MARTINEZ: Well, if you look at it in terms of grading, he was a C student. His grade point average for his three years in high school worked out to be an average student.

QUESTION: You seemed to base some of your argument or a large percentage of it on the fact that he showed up low based on school-given tests and he then showed up higher given a private test. Have you done any checking?

MS. MARTINEZ: No, I don't think I made that contention. He showed up low in both.

QUESTION: Has anyone analyzed the testing? There's a lot of

arguments about testing conditions.

MS. MARTINEZ: I have to respond at this point that he's not been retested officially. My estimation of the fact that he's gained several levels is simply based on his tutors' feeling as to what success they have had over this time. So, at this time, we don't have concrete data on what level he's achieved yet, but we suspect we're going to have it through a battery of tests before the complaint is amended so we can specify what achievement level he's done.

QUESTION: It seems to me you're relying very heavily on test results for a significant relevant indices of school success, and that implies that basic skills of reading and writing are also some of the most significant indicators of success in the technological society in which we live. I wonder, there are people in the field of educational evaluation who have been worried about the excessive use of tests and have suggested that there are other ways to ascertain information that might be more relevant and more credible, and are you also considering other kinds of information, other kinds of skills, such as problem-solving, developing initiative, concern with motivational levels, aspirations of students and so forth?

MS. MARTINEZ: To briefly summarize, the statement he's making is that perhaps we're making a case by focusing in on test results and reading level and things like that but there are other indicators of educational achievement to look at to see what they mean. Is that a fair statement?

QUESTION: Yes

MS. MARTINEZ: We had a meeting last night in which this kind of question came up and it's a concern that I think is legitimate. When you focus in just on basic skills like reading level and things like that, maybe you miss some of the other educational process.

My only response is that it's going to be a very difficult case just using a very objective standard of reading ability, and that to try to broaden it to say what other kinds of educational things he is missing or does he have other things like that is perhaps maybe the next case. But at this time, we have the reading level kind of thing.

I think, too, there's really a legitimate basis for just focusing in on reading ability, saying that if you put a kid out of the school system at fifth-grade reading ability you have really done something bad to the kid. We described him as being a functional illiterate person, and let me describe some of the things he can't do.

For example, he was required to read and sign a complaint which was filed on his behalf. I had been working with this young man for a week or so, talking to him a number of times about all the problems he had in school and his lack of reading ability, and even though I was familiar with this, it didn't occur to me that he really could not read that complaint.

He came into my office to sign it and I handed it to him and told him to read it and let me know. He was getting nervous and aggitated and had to leave and asked if he really needed to read the whole thing over, and I told him he had to read it. He asked if he could take it home. He said he didn't have time to wait.

Finally, it dawned on me that he could not read that kind of language. So it ended up with my reading out loud to him the allegations in the complaint and him signing on the basis of my oral statement.

Shortly before the suit was filed, he was involved in an automobile accident in which he had to read and fill out a claim form in the State of California. He was unable to do that by himself. He's unable to read a complex employment application which requires

more than your name and social security number. He cannot, without spending a lot of time, perform those kinds of functions.

Before he left school he had never read a book from beginning to end. He's completed his very first book since he graduated, which was Jonathan Livingston Seagull--a good start.

QUESTION: Has this young man attempted to get a job and failed, or failed to hold a job, because of his academic problem?

MS. MARTINEZ: His aspirations are extremely low. The kind of jobs that he's applied for and gotten have been dishwasher, physical-labor jobs, moving equipment for a musical band. That's been the kind of job he's held since graduation. He does not aspire at this point. He feels he can't even attempt to do any kind of work which would involve reading or academic skills, and part of the reason that we're asking for some compensatory damages is that we think he's undergone a psychological process in which he views himself as a failure.

QUESTION: Does he have brothers and sisters who have achieved much better success?

MS. MARTINEZ: He's an only child, so he doesn't have anyone to compare to.

QUESTION: Has he ever been tested for dyslexia while in school?

MS. MARTINEZ: He has not been tested for dyslexia. We had a suspicion that there may be some kind of a similar related problem, which, again, we are going to have him tested for his present reading ability and a neurological test for learning disability.

QUESTION: How would you be able to determine the role of motivation--like reading at a fifth-grade level--how do we know that he was not motivated beyond that or studied beyond that point? Where

would that role of motivation apply in your suit?

MS. MARTINEZ: Well, I think that the particular facts in this case are particularly good to remove the question of motivation because he's not from a ghetto family or anything like that, no socioeconomic handicaps to his family. His mother is a college graduate. He's not the kind of student that cuts school or who was a discipline problem.

The fact is that he's now engaged and has been for a number of months in private tutoring, which takes some effort on his part. He's had to reduce himself back to being a student again reflects on his motivation--interests, his desire to learn how to read and his sense of failure.

It's a question which I guess is a matter of proof that we will have to handle at the trial and these are the kinds of things which reflect upon it, but it's something that we will have to deal with.

QUESTION: I've got another ripple-effect question regarding the relationship between you and your colleagues in California and the planning community, whether at state or local or county-wide level in California.

Has there been any interaction on the basis of this case of the residual impact of this case in terms of planners coming to you or you seeking out planners or any communication at all on further questions that may come up under the legal aegis, questions that could be resolved by planning contingencies prior to their becoming legal questions?

MS. MARTINEZ: Did everyone hear that question? The question basically is, what has our office done for this plaintiff--what interaction have we had with other county, state and local planning educational systems as far as resolution of the issue.

I can respond by saying we have had informal relationships with various state agencies and private organizations who are interested in reading. We have had a lot of contact from reading teachers at City College in San Francisco who get most of the graduates of San Francisco school districts, and I have had numerous offers to testify to the fact that they are teaching remedial reading up there and they get many students who are below fifth-grade reading level, and I have had several offers of people who are very anxious to become involved and give us assistance in the case.

I have had a lot of contact from individual parents who want to test similar situations and give whatever kind of support they can.

QUESTION: One follow-up question. Whatever informal relationship may have been developed between the legal community and the planning community, has it been, from your observation, more positive than negative or more negative than positive?

MS. MARTINEZ: I'm really not sure how to answer that question. I don't think we have done anything constructive at this point. I'm not saying there's not a possibility of doing something. We just simply haven't looked in that direction.

QUESTION: You indicated certain tasks that this young man could not perform, on the one hand. You also mentioned the below-grade level or the bottom quartile that he was in. Are you assuming that if he were at grade level that he would be able to perform these tasks?

MS. MARTINEZ: Yes.

QUESTION: That's a poor assumption.

MR. MARTINEZ: My assumption is based upon the fact that various professionals have said that if you can read at certain grade

levels you are capable of doing certain things. Apparently there's in process right now a reevaluation of what grade level means in terms of functional literacy; the old standard has been fifth-grade reading ability was functional literacy, and the eighth-grade reading ability was functionally literate for an academic student intending to go to college; and those standards are presently in the process of being reevaluated as to what tasks you should be able to perform at what grade levels.

Gary, was your answer that they were going down or up?

VOICE: Well, the nature of the tests is going to be different, of course. In writing the past standards used to be fifth-grade reading levels, and now the expectation is that they are going up more toward the eighth grade or beyond, but not grade level. They will be task-oriented.

QUESTION: Most of the tests used measure reading. They do not measure functional literacy. The California test of basic skills, for example, does not measure functional literacy, but it can put a person in grade level and that person still would be unable to perform certain tasks.

MS. MARTINEZ: Yes. I think that's probably true. That's something that when we get to the trial, in the damages aspect, we will try to establish what handicaps he has on this kind of factual data.

QUESTION: If you win your case, what are the implications for the San Francisco school district? If you lose, what are the implications?

MS. MARTINEZ: If we win, it's my expectation and opinion that we will have done several things. First of all, we will have focused a great deal of attention on the educational process and we will have established a duty on the part of the school districts and its

personnel to perform some functions for which, if they don't do it, they can be held liable.

It's my expectation and hope that we will succeed in improving the quality of education. I don't care to speculate on the possibilities if we lose.

QUESTION: Let me just follow that up. Given the disagreement among the professionals regarding testing instruments, goals and objectives of schools, the management structure, who should be responsible for the teaching or the administration for the achievement of students? Isn't it kind of frightening to think that a court of law is going to make all of these decisions and put them in concrete before there's even some agreement within the profession?

MS. MARTINEZ: My response to that is that courts have come into areas in which people are startled at the thought of their exercising decision-making power. You see a judge who has no experience in medicine presiding over a trial in which the theories of medicine are brought out and there are different opinions. I think that my response to that is that the courts are competent, with the use of expert testimony and other procedural devices, to provide for the airing of these kind of disputes; that they are the competent place to provide this kind of contention. You see judges involved in antitrust litigation, patent law, things of immense complication--engineering principles, and all this kind of thing.

I really don't think there's anything startling about using the educational system in a similar way. With that, I'd like to kind of bring in the fact that educators have adopted for themselves the idea that education is a profession, and I think, along with that goes the assumption that a profession also has liability for malpractice; and if you establish yourselves as a profession, then you establish standards for your profession and there are ways of deriving what those standards are and when someone deviates, and that's done through expert testimony and that's what litigation

is all about. Two sides put on their best shows and someone wins.

QUESTION: I'd like to ask a related question. As I understand it, the plaintiff first filed a suit and then the attorney turned to you because he didn't have the technical background in the field.

Now, like any good attorney, you go out and you build a case, which is fine. But do you have technical experts who will testify that what the school system has done is negligence or is the negligence an inference from the fact of what they have done?

MS. MARTINEZ: You say that you have acts of negligence or do you have to infer them. As a legal matter, negligence has to be inferred from acts to begin with. There's no such thing as negligence existing by itself. It has to be in relationship to duty, to standards, to inferences that are drawn from actions.

So, it goes to the kind of proof that we have to put on. We have to put on educational experts who can testify on the basis of their expertise what standards of the profession are, what deviations were made, and the court and the trier of fact then makes the judgment on the basis of the kind of evidence we put on, whether that was in fact negligence, whether there should be liability.

QUESTION: But do you have technical experts right now who will get up and say, Yes, the school district was negligent for not doing "x, y and z"? Do you have them or don't you have them is all I'm asking.

MS. MARTINEZ: We have them available.

QUESTION: Are we entitled to know who they are?

MS. MARTINEZ: Well, we're not in a position to put on the trial tomorrow. I don't have a list of witnesses for you, no. Court proceedings proceed sometimes in a lengthy fashion. Before

you can get to the trial, there's an enormous amount of pretrial work which can go on for literally years in which depositions, discovery proceedings take place, in which the defendants are put on the stand and asked to testify, before you even get before a jury. Those kinds of things will take place before there's any kind of trial.

MR. HOGAN: May I rephrase the question, at least the way that it would seem to me that it might be put? Is the complaint based on a theory of absolute fault, absolute duty, for which there's no defense, so that you succeed if you just prove duty and failure to perform it in the sense of showing that your client cannot read; or is it based on a theory of specific negligence and failure to perform specifically described duties so that you will have to call on expert witnesses to describe what might have been done and then expose yourselves to the defense of comparative negligence, the kind of thing that we have talked a little bit about?

MS. MARTINEZ: The question is: Are we going on a strict liability theory or is it specific acts of negligence? The answer is, both. We are asking for both. We are asking for strict liability just on the basis of his inability to read when he graduated, and it will be an alternative in the first count; if we don't succeed on that theory, then we're going for the specific acts of negligence.

QUESTION: You stated earlier the complaint has not yet been served and that you're considering a revision of your position. The summary that you passed out, does this reflect your points of revision?

MS. MARTINEZ: No. That's a summary of the complaint as it stands.

QUESTION: Are you free to indicate the nature of the revisions to be considered?

MS. MARTINEZ: We haven't really made any decisions at this point. I think that we are taking into consideration the kind of concerns and comments which have come out of the gathering of this type, of a group of professionals.

QUESTION: Assuming that the court wouldn't sustain an absolute liability cause of action and you were going to the specific actions of negligence, acts or omissions, is anyone so culpable and so grievous in terms of an average standard of care, except for that terminal one in which they granted the diploma to a person that was obviously not qualified according to the state statute, that one could find it to be a cause of action that could be sustained?

It seems to me you're dealing with a series of actions, each one in and of itself might not be culpably negligence. It is in your dealing with the system, and your use of the diploma to indicate this is a problem that I don't quite see how you're going to grapple with.

MS. MARTINEZ: The question is basically: Are we talking about any single instance of negligence that we're basing the whole claim on or a series of incidents that culminate in negligence, and I think the question answers itself; that there's a whole series of things that happened to this boy in 12 years, that they all add up to the thing that happened to him, that he got out of high school with a fifth-grade reading level and a twelfth-grade diploma, and they all interrelate. The fact that one teacher didn't tell the next one that he couldn't read the textbook that he had for this semester and what happened in that class, and the next class when he was able to cope with the class--they're all tied in.

QUESTION: Are student files in California open to parents to see?

MS. MARTINEZ: Yes, they are.

QUESTION: But the parents never made the inquiry at the high school level to see the student's files and the test results?

MS. MARTINEZ: Parents usually don't know that the files are available to them. There are principals that don't know that the parents have the right to inspect files. Most teachers don't realize the parents have the right to see it, and unless the counselor offers them in a situation, it's more likely to be that the parents never know the situation exists.

Also, there is a prevalent practice that I have observed, and that is that teachers never look in the files either. So you have a lot of test scores--I mean, they are recorded, but no one considers them.

QUESTION: Do you know in what form those test scores appear? The question really is whether they are interpretable to the layman, for one; and secondly, are they interpretable to the practitioner? Very often, they are raw score type scores which, although for convenience are translated to grade equivalents--were those records raw scores or were the practitioners involved qualified to interpret them?

MS. MARTINEZ: Yes. The question is: What form were the test scores in if someone picked up the test file and looked at it could they interpret it, and the answer is, probably not. You have to have some ability to understand what test was given and what it means.

For example, a parent who looks at a figure in a file sees these stickers--they have this stick-on thing that comes off the test score with the various figures on it, and unless you have a key you can't understand it. You have to know what the test is.

QUESTION: Is the key available to the parents?

MS. MARTINEZ: No.

QUESTION: When asked earlier about your feelings for the positive implications of this case, your statement was something to the effect that "I hope it will positively change the educational establishment," or something to that effect. As an educationist, I share your optimism, but I think it's important to realize that if, in fact, you're pinpointing or focusing in on the use of objective tests to measure the quality of development and acquisition of academic skills; if, in fact, you receive a favorable judgment, I think that schools, in order to protect themselves, might feel the need to be able to demonstrate that their students can perform well on standardized tests and I think we have had lots of experience with performance contracting and the like and know that there are a great number of people who teach specifically to the tests so that positive test results can be achieved; and I'm just worried that a favorable decision won't in fact improve the educational system, but it might lock us into a very traditional notion about ways to assess schooling. That worries me.

Do you have any feeling for that?

MS. MARTINEZ: Yes. I think you're expressing quite a legitimate concern as to what the end product is. My feeling is that the case is viewed as a process. To examine these kinds of things in a forum in which it can be examined with some degree of precision, that that, alone, has made a significant contribution to education.

QUESTION: Just to follow up on that question. I raised a question earlier about letting the courts decide. Well, there was a case in a federal lower court about three weeks ago deciding in the notorious Texarkana contractor, and to my knowledge, there really wasn't any expert advice requested and a jury, after 39 minutes of deliberation, found the contractor did not teach test items and told the school to award the money to him. So it probably established a precedent for what teaching tests are.

PRESENTATION BY FREDERICK McDONALD, DIRECTOR,
DIVISION OF EDUCATIONAL STUDIES, EDUCATION TESTING SERVICE:
"EFFECTS OF THIS ACTION ON CURRENT STRATEGIES TO
DESIGN AND IMPLEMENT ACCOUNTABILITY SYSTEMS"

MR. McDONALD: What I'm going to say this morning is influenced by two sets of events. The first set of events has been occurring over the past year or more as some of you and maybe all of you know. Educational Testing Service has been designing an accountability system for New York City and I happen to be the project director of that activity. So, for the last year, we have been interacting with the Committee on Accountability and, interestingly enough, many of the points that are being talked about here as legal issues or problems or questions did come up in the many discussions that we have conducted on the design of that particular system.

One of the things that I will be doing is explaining how we addressed ourselves to those questions and the kinds of solutions that we came up with.

The other factor influencing what I'm going to say is that I sat in on the discussion between or among Susanne and her fellow lawyers last night and spent most of the time listening, being a layman in their field, and I found the discussion fascinating.

I heard three different kinds of things and I heard some of those same things this morning. One is essentially irrelevant to what I'm going to talk about and that is how they plan the strategy to make their legal actions effective.

The second thing was the theory of law under which they are operating; and the third thing was the kinds of assumptions about educational processes and methods, techniques, and so on that seemed to be intimately tied in with the arguments to be made, whatever theory of law they use, and I had to sort all that out for myself.

What I'm going to say initially really is what I came up with early this morning when I woke up when the cock crowed to make sense out of what I heard last night. There was a lot of "res" this and "res" that. This is some thinking I have done since listening last night and it ties in with the accountability system we have worked on.

Last night, I heard the lawyers interpreting the law as written or as it might be written and I turned that around to saying something that was implicit in a number of questions today: What ought the law to be? If there were to be laws about accountability in education, what might their character be? What should you legislate? What can you command to be done so that failure to do it becomes a matter for legal action? That seems in essence to be the connection between the making of a law and the legal action.

That would lead to the kinds of questions that the lawyers were asking last night, if I heard them correctly, like what duty has been set in or implied in the law and what constitutes a failure to enact one's duties; what is the responsibility of an individual or a corporate group; what are they responsible for?

All of this boiled down, to me, in effect, to a question of this kind: In essence, what can you command reasonably, which then leads to the next question, which is: What do you mean by reasonably? That is, what would be a reasonable law?

Again, I'd like to remind you I know nothing about law except I think I remember something from philosophy that it ought to be rational.

Now, when you're talking about what is reasonable, of course, that determines the nature of the kind of evidence that you produce in a case. Here's what I came up with, this kind of thinking, and, for me, it defined what I regard as the basic problems of accountability.

It seems to me that a law rests on some model of actions about which it is prescribing. There's some assumption about the nature of the phenomena for which laws are being written. Then, I asked myself, What seems to be the basic model that's implied in all the questions that are being asked about who's responsible and what is the duty, etc., etc.

The model that I seem to detect is one that says: If teacher "A" or school "A" does "x", it will have consequences or effects "B" on a child or a group of children. Speaking as a scientist, I would translate that into an "if/then" kind of proposition, but laws don't write "if/then", if I understand the laws; but it seems to me that that's the underlying model of action that's implied.

Now, when you say that, then that leads you to the question about the strength of the causality that you're willing to read in the connection between the actions of the teacher and the actions and its effects or the actions of the school system and their effects.

Therefore, it appears that what we're really arguing about are inferences about causality in which we have two sets of variables: variables associated with instruction, whether they are mediated directly by a teacher or they are mediated by other factors in the system; and consequences on pupils. In this particular case, the consequences are defined in terms of reading scores.

Now, if you want to make inferences about causality within that model, what kinds of conditions to you have to meet? Let me suggest some. To me, these seem to be the conditions for making strong inferences; that is, inferences that there is a direct connection between the actions of the teacher or the actions of the system and the consequences on the student. To think of it in terms of a single action of a teacher--that might be the easiest way to visualize what I'm saying--you can claim strict causality if you have proof that if, and only if, the teacher does "x" consequence "y" will occur. It seems to me logically necessary that the inference can be strongly made only if you establish the basis for the "if" and the "only if."

The second thing that seems to be implied as a set of conditions is that you must also demonstrate before you can argue for the strength of the causal relation, that no other factors are impinging upon the effects themselves; that is, if you ruled out as all other possible causes of the effect, other than the behavior, the peformance of the teacher or the school system.

Incidentally, I'm offering these ideas and I hope you will debate them because I'm sort of thinking this thing through myself.

The third condition for strong inferences about causality is that it seems to me you have to demonstrate that all of the factors that would make the action of the teacher or the school system effective as prescribed in the original causal statement must in fact be under their control. To the degree that neither the teacher nor a school, or whatever other component you want to deal with, has control over the variables that are in the causal statement, to that degree you cannot draw the conclusion that it is the actions of the system that are affecting the performance.

Now, it seems to me the basic problem of the logic here lies in establishing the nature of causality and what I stipulated--I guess I'm falling into their language--what I have suggested as hypotheses is that there are three conditions under which you can strongly claim causality. Now, there are some related problems which are also mixed into all of this and which are not directly related to causal problems but are related to the whole case and to accountability in general; and that is: What are the criteria for the effect, the whole problem of the desirability of effect?

It seems to me there are two parts to that problem. One is: What are the criteria of desirability--and that has been referred to in a number of questions this morning--and what are the causal interdependencies among the effects? That is, if you get improvement in reading, what in fact happens to mathematic skills or to citizenship or something else?

Therefore, judgments about consequences have to address themselves to how you establish whether it is desirable that all children learn to read or not, as well as to what happens if they do or do not to a certain degree.

A third problem is, in many respects, the whole problem of evidence; and that is: What are the criteria for the evidence that you are going to use to judge whether or not an effect is occurring?

Now, it seems to me to be somewhat misleading to focus only on the kinds of measures used and to ignore the basic problem, because the basic problem will not go away whether you use tests or something else. The basic problem is: What is evidence that whatever the desirable criterion is, whatever the desirable effect is, what evidence will you accept as bona fide evidence, valid evidence, that in fact it is occurring or it is not occurring?

There are a number of very tricky measurement problems involved in using such things as reading scores that weaken arguments for them. It seems to me that when we designed the accountability system for New York City we did take into account many of these problems.

One of the first things we addressed ourselves to was the question of responsibility for effects, and we attacked that problem in two ways. Again, I want to refer back to what I said a few minutes ago, that in attacking that problem we were attacking the problem of causality; how can you establish who the causal agent is for whatever the consequences are that you're looking at.

We were first influenced by technical considerations which are involved in the decisions about, judgments or, thinking about Peter Doe. If you're dealing with individual test scores, of course, you're dealing with less reliable phenomena than when you're dealing with scores for groups of people. Therefore, to build accountability cases or models in which you make direct inferences from the scores of individuals without mediating them through an analysis in terms of means

of groups is allowing yourself to use measurement evidence that is less strong; but that's a technical problem and we spent many hours fiddling around with how to use the measures themselves.

However, what we did come up with was the idea of using the means of schools rather than the means of classes as a basis for making judgments about deficiencies in educational performance; rather than the means of classes, which is now closer to the individual student; or the performance of individual students, which is even closer.

You have two possible causal agents here: the teacher and something called "the school," and you would look at the scores of the teacher's class or the scores of individual pupils in that class to make judgments about her performance. Since that kind of information tends to be somewhat unreliable and difficult information to use to make good inferences, we have chosen to use the mean of the school.

Now, the other reason I think is much more important because it does go back to one of the conditions I set for establishing causality, and that is, I think it is impossible to show a direct causal connection, except in limited cases, between the performances of teachers and direct effects upon students, especially the longer the student is in the educational system; and there are some very simple examples that we use. It relates to my third point.

That is, the teacher does not have complete control over all the causal factors, but the school does. For example, if the teacher decides that she would like to do something about the reading program--supposing she decides she wants to institute a particular reading program and does not have the resources to do that, so she appeals to the administrator or it requires some administrative changes in schedules or allotment of time to subjects and so on. The teacher, in a sense, cannot make that decision. It has to be, I suppose, approved in some respect by the principal. To that extent, she does not have complete control over all the actions she could take to produce a

desirable effect. Therefore, is not the principal also accountable for whatever the effect is now?

If the principal, in his decision-making power, is limited by a school board which sets priorities on how it spends money, is not the school board also accountable?

So what we have developed is an accountability system that, in effect--I have to be careful how I use the word because it sounds loose--specifies accountability for all the components of the system; and the logical argument is that each of these components, in some ways, mediates or controls a causal factor or set of factors that directly or through some mediational process influences student performance. It's the old business that in a very complex situation multiple causal factors are operating. The problem of accountability is to try to specify who mediates what causal factors and to make everything rely upon one causal agent seems to me to be insupportable in terms of research evidence, and it doesn't make any common sense, either.

Now, the other problem is more basic. Supposing you can specify what the causal agent is to do or what the causal agent is responsible for. Can he or she or it do it? Now, the attorneys have all heard the arguments from the educational profession that the state of education research knowledge is not such that if you told us things are going badly we could reach into our books and pick out something that we know would work. Those are valid statements.

If you stop there, of course, it sounds like the school system will never be accountable for anything because they don't know what to do in order to change it.

So what we suggested as another principle is that while the school system is not necessarily accountable for having precise knowledge, it is accountable for using whatever knowledge is available and is accountable for attempting to apply it.

So there are three major components in the design presented to New York City. The third component is something called the corrective action, (by the way, I'm not saying this has been prescribed by New York City. This is what's been proposed to them to implement). Each school, is to come up with a corrective action plan that is designed to produce changes in its school, and that school--which means the principal, the teachers and the representatives of parents--are accountable for producing that plan and they are accountable for producing a plan that specifies staff performance in terms of specific objectives. They are accountable for developing monitoring systems and they are accountable for reacting to the evidence of the effects of their plan.

So they are accountable for those three things. They are accountable for specifying clearly stated goals which presumably are achievable. They are accountable for devising a plan that can be rationalized in the sense that this plan ought to produce these effects. They are accountable for specifying who monitors whom so that you can find out whether the plan is being implemented, and they are accountable for looking at what the consequences of the plan are and then doing something about that in the next phase.

They are not accountable for having infinite wisdom. They are not accountable for ordinary mistakes and they are not accountable for knowing more than, in effect, they could possibly know at the present time; but they are accountable for using whatever information is available to devise a plan. In that sense, they are accountable for becoming a part of a problem-solving mechanism to eliminate undesirable educational consequences.

Now, that presents an interesting issue because one of the things that comes up all the time is, are you accountable for product or process? I think it's an empirical mistake to settle on either side of that issue. You are accountable for both the product and the process. If you knew precisely what process to apply in order to get the product, then you could be held more rigidly accountable for the

processes. Since you aren't, you are accountable for at least attempting to act intelligently in a process manner in order to produce a better product. I would be very interested in your reaction to that.

Now, let's go through some of these problems in terms of the situations that are involved here.

One of the things I mentioned earlier is the whole question of what will be desirable effects. In this particular case, you deal with the value systems of the community and, in the case of New York City, they solved the value problem for use rather simply by saying, instead of opening up what the schools shall be accountable for we recommend in the early stages of the accountability design that we focus on reading, communications skills, school attendance, and quantitative skills; and that, therefore, the effects that we want to see something done about in terms of accountability are these four effects.

Now, that decision is a sociopolitical decision. Presumably, it's negotiable with large numbers of people. Ultimately, I suppose the board decides what they will be accountable for. I don't know how you change it from being a sociopolitical issue except to try to take the tack that evidence indicates that some things are necessarily interlinked with other things and therefore the school must be more accountable for them than they perhaps are for other things.

For example, if it is true, or if the reasonable probabilistic case can be made that without acquiring reading skill or quantitative skills you do not achieve other desirable ends, then it seems to me perfectly reasonable to say that the school is primarily accountable for producing those things. The fact that they are called basic skills seems to me to be just a metaphor that we all use, but it unfortunately is a metaphor that distracts some people. The issue rests on what is prior and what is consequence, and whatever is prior, it seems to me that the logic of accountability requires that the school be held

most accountable for that consequence which has the most consequences in other domains of living.

This is really a minor point in the context of this discussion. There's a difference between the kind of empirical analysis of values that is implicit in what we have just been saying and people's beliefs about what's valuable and their perceptions of beliefs, and I don't know what the connection to the law is, except that sometimes when laws are made they eventually have consequences in how people come to believe. But the sociopolitical reality is that some people believe that some things are more important than others and the evidence is irrelevant and their beliefs get mixed into the arguments about what the schools should be held accountable for. I frankly don't know how you resolve the sociopolitical nature of a community with the narrower legal kinds of concepts that are involved in a suit of this particular kind.

Now, one of the basic problems is the problem of measuring effects and establishing causal connections between aspects of the school system and effects. We could go on for hours about the measurement process. In designing a system like this, we simply did very practical kinds of things in order to get the system started, and that is, we suggested that they use their present tests and move as quickly as possible to criterion reference tests, which may not solve a lot of problems of making judgments, but many people would feel much more comfortable if the tests were criterion referenced rather than norm referenced.

The basic problem is how do you describe deficiency so you can relate deficiency to causes. Many of you will remember that it was a year ago June, roughly, or the spring of '72, I guess, when Kenneth Clark wrote a rather strong statement about the model that Henry Dyer proposed for the New York accountability plan. The essence of his argument was very simple and that is that you will use socioeconomic factors to explain away discrepancies, and everybody knows there's a correlation between performance on reading tests and any other kind

of test, of the ones that are readily available, and socioeconomic factors.

What Clark fears, and very rightly so, was that you will now follow this chain of reasoning: If socioeconomic factors correlate so highly with reading performance, the most probably cause of reading performance is not to be found in the school system but in the home or the community.

Now, that was a real problem and, fortunately, we have solved it. The way we did it is rather interesting. What we have proposed was a different kind of regression analysis than was proposed in that original model that Henry developed.

You need the following kind of information to do the analysis we are talking about: Remember that the goal is to find out who's deficient and better yet, in the process of finding out who's deficient get some better notion as to what the sources of deficiency are. We need two measures in point of time. Let's take reading as an example. You have third grade reading scores and fifth grade reading scores and the time interval is not important except for technical reasons. It can be beginning of third grade to end third grade, beginning of fourth grade to end of fourth grade, or whatever you want. You get better information depending on how you collapse or extend that time interval. You have all the reading scores of all the children in New York City, all the elementary schools, all 600-some of them, and you do what's called a regression analysis in which you regress fifth grade scores and third grade scores. When you're done, you end up with a chart which I'll do backwards (indicating), that's got a regression line in it and every pointin that chart represents the mean score for a school. Some of the mean points are above that line. Some are below.

As you look at that chart, you can go down anywhere along the horizontal axis and identify a reading score, a mean reading score for, let's say the third grade, and as you move up along the vertical axis you will find schools that have quite different fifth grade scores.

Now, what do you know in that type of analysis? You know one thing. Irrespective of socioeconomic conditions or any other factor, these schools all began at the same point. The basic student input--that is, where students were at time one for all of these schools--are the same, but, obviously, some are doing better than others.

Now, that's what you want to identify. You want to identify those components of the system where the effects of whatever the system are, some schools are more beneficial on students than other places, and you want to identify those components in the system where the effects obviously are not as beneficial as they are somewhere else. That's the first thing.

That regression line is where you would be expected to be, using all the information you have. If you're above it, you're doing better than would be predicted in those postdiction analyses; and if you're below it, you would be below where you are expected to be. We call that distance the Student Development Index and its name is going to get changed. Some people want to call it the School Development Index. That distance becomes a factor for identifying schools who must do something about their programs. Any school with a negative student development index must produce a corrective action plan.

Now, the other component in this analysis was to set a floor on how far below you could fall, and the other part of the accountability plan fits in with the New York State decentralization law which requires the chancellor to set minimum standards for all the schools in the city.

So, you have two pieces of information for each school: What percentage of the students fall below minimum standards, and whatever school you're in, no matter where you fall on this other analysis, if you have students below the minimum standards, you must do something about those students. You must come up with a corrective action plan to remedy those effects.

The second piece of information is this discrepancy. Supposing you don't have anybody below minimum standards but you're performing less well than other components in the system whose students began at the same point as your students did. You also must come up with a corrective action plan.

QUESTION: Could I ask a question here? When you say "students began at the same point," that builds in the concept of soceioeconomic factors. It's not just that you have two children or two groups of children who have the same reading scores, but it's what their reading readiness scores are when they enter school?

MR. McDONALD: That's right. It's correlated with it, but you're not using it to wash out the differences between schools; let's say you take the low end of the scale, which is all anybody ever talks about, overlooking the fact that there's going to be discrepancies at the high end, too. Supposing you look here, and here are kids where, on the average, their scores--we'll make up a number of 30--a mean score for all kids in that array was 30 in the third grade. Irrespective of socioeconomic factors, there are schools in which children who started at that same point who are doing much better. So what you do is minimize the possibility of immediately drawing the conclusion that the differences are due to socioeconomic factors. If, in fact, they are highly correlated, as we all know they are, the first step in your causal inference is not to use that as an explanation. Okay.

Now, the second step is the important one. What distinguishes these schools that are above this regression line from those that are below it? We have proposed a complex system which has a lot of methodological problems to be worked out, but, in essence, you gather data on the school system. You gather data in five categories: characteristics of school programs, characteristics of school facilities, characteristics of the school staff, characteristics of the student body, and characteristics of the home and community; and you analyze these data for all 600 schools to find out what characteristics

in each of those categories distinguish the schools whose performance is above this regression line from those that are below it.

That information goes to the school. Each school gets three pieces of information: (1) What their student development index is, positive or negative. I should put it in importance order. (1) What percentage of their students are below minimum standards. (2) Whether their student development index is positive or negative. (3) What factors seem to be associated with the difference between them and somebody else.

What gets overlooked is what happens next, and what happens next is what is important.

That information goes to each school. Each school must come up with a plan that takes into account all the information on factors distinguishing the two kinds of schools, the two broad categories of schools. They may also--they are encouraged, to do in-depth analyses of any of the schools in the system where they think they can get information that they can use, but they must come up with a plan that will take corrective action.

That plan, in turn, goes to the district board. The district board makes decisions among the plans. This is where the boards now become accountable for setting priorities. Each school must develop a plan which has two budgets. One is a budget for what they would do if they couldn't get more money, which is ordinarily called a zero budget, I guess.

In either case, the school is accountable for coming up with a plan. The boards are, in essence, accountable for setting priorities, and then, the district plans move to the central office, the central board, which presumably, in turn, is accountable for setting priorities and allocating resources to make sure that these corrective action plans are implemented.

Now, obviously, the most important part is the last part. In the context of this case, it seems to me that the school system is being accountable for three things: It is being accountable for identifying discrepancies in a relatively sophisticated way. It is being accountable for identifying the causes of those discrepancies and it is holding itself accountable for doing something about those causes.

DISCUSSION

QUESTION: I thought you were jesting when you said it was an administrative press release that dealt with the argument that Kenneth Clark raised, but--

MR. McDONALD: Did I say that?

QUESTION: Or something to that effect. Maybe you weren't. The student and parent and home--two sets of factors to be examined--it seems to me that that was the problem that he was raising. If the school determined that the faculty, the programs and the facilities were essentially equal, yet you have had a vast discrepancy between the scores of two schools, let's say, how would the school go about corrective action and would it be responsible in terms of the causality that you outlined before? I mean, you said only those factors which the agents have duty or responsibility over.

MR. McDONALD: I'm glad you asked that question because I omitted something that is important. The question is: How is the school accountable when you have to show that the factors in effect lie in the home if you do a certain kind of analysis? The school is not accountable for changing the home. It is accountable for doing anything about any factor that may be related to home conditions about which the school can do something. For example, the school system cannot change crowding conditions in New York City in a housing area. It can, however, provide adequate space and proper conditions for study for students.

The school doesn't have a rat infestation elimination program and it doesn't put more vacuum cleaners in the home, or whatever else is now highly correlated with academic achievement these days, but what it can do is provide conditions that would be appropriate to help the student achieve.

So, the school cannot say, "Well, look, these kids don't have

proper study conditions; therefore, we can't do anything about it." They must come up with what amounts to compensatory mechanisms for those conditions.

QUESTION: Fred, you said something earlier about the parents being accountable in the development of the plan. Did I understand that correctly? To whom are they accountable.

MR McDONALD: I didn't say that, because that's the issue we finally gave up on. What I said was the school planning committee is accountable. The parents participate in that planning process. The Committee on Accountability raised the question repeatedly: Should we not hold parents accountable? It was their opinion, and with reasonable argument to us, that it was almost impossible to press that in any kind of way that would have any force.

So, in the strict sense, parents are not accountable, but they do have a real role in participation in the plan.

QUESTION: Well, I'd just make this comment. I think that's a mistake on the part of the committee. There isn't any inherent reason why we can't give a school district some legal controls over parents that it doesn't have now--if a kid is coming to school without breakfast, without a meal--I think unless you face this problem--I think it's something that ought to be faced.

MR. McDONALD: Yes. It's something to be raised again. As a matter of fact, the statement that you just made is more specific than anything that was ever said in the discussions when that point came up. It was sort of "throw up their hands" and say "What can we do?"

QUESTION: Given the existing legal structure, there isn't any way of doing it, but I don't know why we keep taking this existing legal structure for granted.

QUESTION: I think even within the existing legal structure, there is a mechanism for holding parents accountable for one of your criteria; and that's school attendance. There is a well-established legal framework for holding parents accountable for their children being in attendance.

I suppose you could use that model and try to extend it to some of the other factors. I don't know how fruitful that might be.

MR. McDONALD: In essence, that's a question I'm asking those of you who are lawyers. Supposing a school system had an accountability system like this. Obviously, it's doing something that other school systems are not doing. What would be the next legal steps to make it work? And you're suggesting something.

QUESTION: Where do teacher unions fit into this picture?

MR. McDONALD: The Committee on Accountability was made up of a diverse number of groups which changed from time to time, regularly, but I guess wisely, in the long run. First of all, the teachers' group was always a participant in this and in their old contract they entered into an agreement with the board to set up an accountability system. On the final report, their representative there agreed on the final report made to the chancellor.

What position they have beyond that is up to them to say.

VOICE: The fact of the matter is, that the teachers' union initiated that contract. That's the reality of it. I happen to know because I served as executive secretary before ETS came. When I came to New York and made the rounds and stopped in Al Shanker's office, he said, "We have this clause in our contract and we have been so busy putting out fires that nobody has been able to do anything about it." So he asked the university to get going on it and we did. But it was really their initiative much more than the school districts that got the whole thing going.

MR. McDONALD: Yes. I was responding in a politically very careful way to the fact of would they support this plan; and I can't make a statement. Certainly, they have been involved in it from the beginning and so have a lot of other groups, United Parents Association, etc.

QUESTION: Was the composition of the school planning committees set out?

MR. McDONALD: Yes. In fact, we had it very specific at one point and then we modified it in order to give the system as much flexibility as possible in making what are really administrative decisions. The principal is the head of that committee. It has several teachers on it, one of whom must be the teachers' representative in that school; and then, it must have the heads of the parents' organization. In New York City, every school has to have a parents' organization, and the heads of that are on there.

Now, what I kind of forget now is--we, at one point, gave the parents the right to pick other community representatives if they wanted to, and I can't remember whether that stayed in the final proposal or not. In essence, we tried to balance the groups. We had proposed originally to make the chairman elected, and people thought it would be better to make the administrator the chairman because he's responsible, and this is clearly a way of fixing his responsibility publicly.

QUESTION: Did you say that the measures, like the third and fifth grade, would be taken in two different points in time?

MR. McDONALD: Yes.

QUESTION: Well, the question I'm curious about--in New York, it's well known that there is sometimes as much as six percent turnover in student body in certain schools.

MR. McDONALD: That's one of the problems.

QUESTION: It's quite possible that because of this turnover, one school may appear to be superior, and by comparing it to another school you may be asking them to come up with the level of somebody else's deficiency and alter a very effective program.

MR. McDONALD: We are very sensitive to that problem. That's a methodological problem that has to be solved. Mobility data will have to be in a different form than it is now before you can get a good answer to that question. The mobility data is reported in the gross figure of 150 percent turnover, and you have no way of knowing whether that's the same kid that's gone out and back and gone out again. We have proposed a field study to start this thing in order to answer questions like that. If it turns out that that's an insolvable problem, I don't know what we'll do next.

QUESTION: In effect, one school may appear to have a superior program when, in fact, it doesn't at all.

MR. McDONALD: Yes, if you were insensitive to this problem; but we are not insensitive to this problem. The likelihood of us saying "A" is better than "B" when there's a big difference in the student body--the probability of that is zero.

QUESTION: What happens when there's a conflict between existing knowledge and union negotiation? In the kind of data presently available in terms of pupil/teacher ratio, there's no difference until you come down to 1-to-16. The teachers' contracts now requires or specifies certain pupil/teacher ratios which lacks a knowledge base to specify. What happens when there's a conflict? Who yields?

MR. McDONALD: It will be interesting to see. You can't resolve that kind of thing now. The biggest problem is to get those schools actually involved in the corrective action planning part. I am personally more concerned about that than I am the statistical

methodological kinds of things, because there are plenty of skills in that respect. But what you're now talking about is a group of teachers and parents and a principal getting together and saying, "What are we going to do about this," and coming up with a very concrete plan that they are going to be held responsible for. Bringing off that part of it is going to be complicated.

There's already a negotiable issue in there in terms of use of teacher time since that's already specified in the contract. So that's between the union and the board. Meanwhile, back at Princeton, I'll read about it in the Times.

QUESTION: What measure is used to determine if a school in fact met its accountability; and if not, what kind of penalties are there?

MR. McDONALD: Well, it seems to me you can't penalize somebody--this goes back to the causal issue. There are two problems here. Let's make sure I'm hearing you right as to which one it is.

You can't penalize someone if the effects don't occur. I don't think that's what we're talking about because our knowledge is not that precise.

What do you do if they don't do anything to make sure the effects don't occur? For that, there's no penalty. Our response to that is that the informal system will take care of that.

One of the items proposed in the accountability plan is that any aspect of any school's plan be made as public as possible. It's not just a matter of school board meetings. It appears in the press. It's given as much visibility as it can be given.

New York, being a very sophisticated political city, it's inconceivable to me, with that much information available to the public, that nothing is going to happen. On the other hand, people would feel a lot better if somebody would say, "What happens if they don't do

anything?" You see, there's supposed to be a director of accountability for the whole system. He will know whether a principal has got his staff together and prepared a plan. There won't be any plan. There will be a lot of informal communications and the system now has adequate mechanisms for handling these things informally.

I'm not that close to the system, but just as an outsider who observes it and talks to people it it, it seems to me you have got to count on some of that. But it would be, in my personal judgment, premature to start invoking penalties at this point because the plan has a very positive, constructive aspect to it. If the teachers are willing to accept this kind of accountability and if it has this positive problem-solving, constructive aspect to it, it would be much better to get that spirit into the system than to start talking about, "Now if I don't do this or that, what happens to me?"

QUESTION: Are standardized tests going to continue to be the measurement?

MR. McDONALD: Yes, because that's all that's available, and the decision is a pragmatic one there. It is better to start getting people thinking about accountability using whatever you have available now, but also to urge them to start developing other procedures.

The first thing that has to be done is to set the standards and the process of setting standards means identifying the criteria which should then lead to better measures of the criteria.

QUESTION: I see the subject that you're discussing to be completely different from our first subject, in that you're talking about a class type of accountability, while the suit was on individual accountability; and the technical problem of mobility to handle that probably is larger than the whole other problem, I would presume, in terms of dealing with individual accountability.

It might be an interesting proposition to say if a district does meet class accountability, may an individual come in on the individual accountability--bring a suit on individual accountability? I don't see your system addressing individual accountability as is being provided in the first one.

MR. McDONALD: Well, lawyers ought to answer that question, but I think you have correctly identified the problem. I'm talking about the whole problem of accountability and I guess, in effect, what I'm saying is it is now both technically possible and reasonable to begin to ask for class accountability.

Within that process of defining class accountability, speaking now as a researcher and so on, I see the real possibility for establishing a basis for a lot more individual accountability. That is, as knowledge is produced about what is effective, it becomes more and more difficult for any individual or group of individuals to ignore that knowledge.

MR. GREEN: There is a connection. It seems to me there is a very strong connection, because the criteria that he's speaking of is under the first category of raising the question about what's desirable comes down to three matters, if I heard correctly, reading, attendance, and vocational skills; and then, the process of accountability calls for the school to do certain things.

The case that we looked at had a very strong element in it of negligence that had to do with whether or not the system had made decisions admittedly affecting a certain particular individual, but the system that he's describing is addressed to the conditions under which that kind of claim of negligence--

QUESTION: No. Technically, on the question of mobility, he has not handled the individual accountability within the system in New York City.

MR. McDONALD: But there are a lot of people who aren't mobile, and I guess this kid wasn't very mobile in that San Francisco system and he probably went to whatever the feeder junior high schools and elementary schools were. I personally would bet money that there's a clear record on that kid in the files and he isn't mobile.

QUESTION: But I think he was talking about 150 percent turnover in Title I kids in one district or in one school that was a 70 percent turnover. So you're still coming done to the school, unless you have the technical problem of mobility handled, and I don't think you're really going to handle the individual--

MR. McDONALD: I don't personally regard that as an insoluable problem and I don't, namely, because that's my cognitive style, but mostly because nobody has ever looked very closely at those measures of mobility. It's a statistic that is put together out of a lot of data and the individual tracking information simply is not available. If it is in the original form, it's lost in paperwork.

We face this problem all the time. We've got a big proposal in for an evaluation study of desegregation where you compare the effects of the ESEA money and one of the basic problems there was the tracking problem. How do you find kids so you can say there are constant enough effects in this school that you can trust the reading scores? Maybe they're better this year because they're new kids in there, or worse because there are new kids in there.

In all the evaluations of school systems the tracking of individual students is a basic technical problem that simply has to be solved before you can begin to draw inferences about what your data mean.

On the other hand, I would also be willing to bet--now I'm talking about my intuition here, not facts--I would also be willing to bet if you looked at school scores, school "A", "B", PS-91 and so on, over a period of five years, and assuming no radical change in a district line or housing patterns, that you would find those scores fairly

stable over time, which to me is at least an empirical argument for the fact that the school mean is fairly stable because the factors affecting the school means are fairly stable. Since we want to make inferences about that component of a system, the mobility problem may not get in the way of making that inference.

QUESTION: What about a system where you not only have a high mobility rate or turnover rate in the school but you have changes in the socioeconomic status of the neighborhoods feeding those schools? We have neighborhoods that are deteriorating and others that are improving socioeconomically. Do you take any account of that in your decisions of where the school stands?

MR. McDONALD: Yes. We will take that into account in the analysis because the essence of the analysis is to try to determine the relative influence of various factors on those means, and that's a complicated kind of statistical analysis and it's actually the problems in making that analysis that leads me to believe that the most you can do is make weak inferences about causal effects and not strong inferences because every technical point that we have discussed here, which is really a statement about causal connections, rests upon evidence that is less than perfect and has all kinds of problems in it.

Therefore, I don't believe that it's very easy to establish, speaking as a scientist now and not as a lawyer, the kind of proof I would require to establish causality. The best I would conclude, is that there is at least weak or moderately weak connections. But we're arguing, if at least there are those weak connections present that's still a basis for the school system to try to do something.

QUESTION: I'd like to try to make an interpretation that merges the two parts of the morning and have some comments as to whether the interpretation is correct or not. Going back to what Mike asked earlier about what's an inference and what's going to be established by first-hand testimony, as I understand the thrust of the suit, it does not allege that the school district did not test, did not have

files, did not have curriculum. It asserts that the way the thing came out in the wash was that one kid came out illiterate and the system said that he was doing all right.

Now, you're discussing a new system and obviously it represents a lot of change in terms of how a bureaucracy can function and monitor itself if it ever got completely effective in it. Under the system, children would continue to graduate from high school with average grades and be functional illiterates.

Under the new system that you're proposing, would it not be possible to make a lawsuit drawing upon Mike's indirect inference comment earlier, that every time a kid graduates from school and has average grades and can't read well, it doesn't make a bit of difference what the planning process was or whether some principal was held accountable or promoted or not promoted; the system is alleged or inferred to be negligent by the fact of the way the product came out.

MR. McDONALD: Yes. It seems to me that really is the basic question and that's why I was very interested in Mike's question, too, about how you're drawing inferences here. It is true that kids will probably still come out of this system way behind in reading and perhaps, for all practical purposes, be functionally illiterate, and I suppose it's really a question to the lawyers present. If you don't produce the product, but you demonstrate--which this system would now make possible--you could demonstrate that you tried to produce the product, could you be held liable for negligence? That's the trick.

You see, that's the same kind of foolishness that we have with this corrective action bit, with the guidelines in the corrective action. All you're doing is substituting process for product all over again and just coming up with another kind of process. Personally, I agree with th s gentlemen. I don't see how it's going to make any difference in how the kid is going to come out.

QUESTION: That last statement is an empirical question, and I'm no more of a prophet than you are, but it seems to me--

MR. McDONALD: I am claiming to be a prophet on this.

QUESTION: And I value your prediction. My own feeling is that if the system gets mobilized as a consequence of being held accountable, that you probably will see less deterioration than you see now. If the school board asks, "Are you going to change all the things that we now know are undesirable," I'd say, "No."

What I would find very unfortunate in a discussion about accountability is that, to many, this is merely a substitute of process rather than product. I don't know how you can sue me for something that you could not prove I could do and I'm not doing, because I'm malicious, incompetent, lazy or whatever else.

If you ask me to build a good car and we know enough about technology of building a good car, it seems to me you can't sue me. If I don't know how to educate every child to read, can you sue me because every child can't read?

MR. McDONALD: Yes, because you're the expert.

QUESTION: Even the Department of Transporation requires recall.

MR. McDONALD: Recall the teacher. That's a good idea.

QUESTION: As another example, it seems to me that you are, in your educator's term, describing what the lawyers would call a false standard. The system should only be made to shape up or change when they are at fault and you're proposing what strikes me as being a very rational way for the system to try to shape its up so it's not at fault; and it seems to me there are other areas which we could talk about by analogy in which the system doesn't rely upon fault.

I have often said that the person shouldn't be held responsible if they don't seem to be able at least under present technology to do something about it. Now, it seems to me there are lots of areas in which we make the system pay even though we agree that they can't do anything about it.

One thing you might think about is a way for applying a fault concept here. Take, for example, workers. We know that some workers are careless. We also know that some workers are accident prone. We also know that other fellow workers are often careless and that things are just dangerous around working plants. Nevertheless, if a worker gets injured at the plant and is disabled from earning money in the future, unless the person can be shown to be grossly responsible, grossly the cause of his own injury, we pay him. We compensate him.

I'm not saying this is a brief for workmen's compensation system, but the concept that's embodied there is that even though the employer is presumed in this particular case not to have been capable of preventing this injury and making it safer, we nevertheless feel there are lots of good social reasons for making other people pay--in effect, the other workers, if you like, or the consumers pay for the fact that someone is disabled and you might think about saying, should society in some way chip in for students who come out who are disabled?

Let me just give one last example. You might walk out the door here today and be bitten by a dog and the dog runs off and you go to the local hospital and you say, "Gee, I have just been bitten by this stray dog," and so they give you some rabies vaccine to try to find out--suppose you're one of those unfortunate people who has a very bad reaction, very serious complications from taking this rabies vaccine. Now, it seems to me, although courts are certainly split on this kind of question, there are lots of good reasons for saying, even though all scientists will tell us we can't make rabies vaccine today any safer than it is, it seems to me there are lots of good reasons for letting you, the person who had these very bad complications, to be able to collect from the system for the injuries,

even though it's beyond their competence for doing anything about it.

I think at least we ought to have that alternative model as one that is out there at least in some cases as a possibility in mind, and not only proceed as though the only legal model available is the fault model, although I must say you might well conclude in the end that the fault model is very apt.

But the comment this gentleman who spoke last about, it's not going to do anything about the children, I think what he has in mind is this other kind of model.

MR. McDONALD: I think it's good to keep in mind the distinction between what we're trying to do, which is not to solve legal problems but to build an accountability system which will meet its original goals of trying to improve the quality of education, and the kind of social and legal theory that you're talking about. Obviously, a system like this creates problems for you lawyers. I guess I'm glad it does because that will clarify a lot of issues. And it seems to me what you're suggesting is a way in which lawyers can now tackle a problem if a system is doing these kinds of things.

QUESTION: Fred, if I understand the concept--and maybe this is really a simplistic reaction and it's inherent in the concept of using a class rather than an individual--but it seems to me from the lawyer's point of view you might consider a situation in which your accountability design results in different individual students who are similarly situated being treated much differently, and I have in mind the following kind of situation: If you take a hypothetical low-income, ghetto child, and a hypothetical middle-income child from a traditional kind of middle-income home, both of whom test out identically before they start the school process, and you put them into the same school and their results diverge so at the end of three years, assuming some kind of norm reference system or criterion reference, too, I suppose, they have much different results. If the school is basically a

middle-class, middle-income-oriented school, it might be determined to be performing adequately under the accountability design and, therefore, no corrective action has to be taken and nothing in the accountability design would deal with the deterioration of the ghetto child.

MR. McDONALD: Right.

QUESTION: If you switch those two children into a ghetto school the same divergence would result. There might or might not be corrective action, depending on whether that ghetto school was performing relatively well as compared to other ghetto schools.

MR. McDONALD: No. Compared to any school which started where it began which isn't necessarily the same thing. But your point is well taken. This system is a class-type notion of accountability. Presumably it could move to the teacher accountability kind of thing in terms of the individual child. The problems of establishing causality there are just so complex, despite the desire of hundreds of people to say we know some teachers are no good and we want to get them out of the system, when it comes to establishing a relation between that teacher's behavior and the kid's reading score, that is such a network of problems that people doing what we're doing don't want to propose it.

QUESTION: I'm really thinking of it in lawyers' terms, in sort of equal protection terms. Two kids who start the school system equally have equal socioeconomic backgrounds, show equal deterioration, if child "A" is in a Queens white, upper middle-class school, no corrective action will be required for him or the class of children like him. If he happens to be in a Harlem ghetto school, where he's more typical of the class in that school, then corrective action may be required.

It seems to me this is disparity of treatment which might lead to another theoretical lawsuit.

QUESTION: I have two questions or two points. First, there's a technical question regarding whether you hold classes accountable or individuals. It would be technically wrong, I think, to try to base an individual student's progress on standardized tests because of the nature of the error. You have to have a larger end. If you use criterion reference tests, then you're comparing the student against his own projected performance.

Now, the second point, I'm aware of the problems of New York and the situation there, but I would hope that this accountability model which does allow for decentralization of responsibility but very little incentive or punitive aspect based upon performance, is not considered as the end-all.

Now, I don't think one can say these incentives can remain for a long period of time, but they do provide the purpose of starting up a program and getting one implemented in the most effective manner. Once you learn what procedures the teachers decide to use and if they work, then you can hold the teachers accountable for going through the process.

MR. McDONALD: Yes. In the State of New Jersey, they had the Bateman Act, which I thought was beautiful, speaking as a psychologist--a beautiful incentive system because the school system could not get more money unless it showed it was producing certain things and showing evidence that this program was improving. But New York is going to have to work through that political phase. It's a little difficult to talk about incentive systems under the present conditions.

QUESTION: At one point Michigan had a statewide accountability model involving 112,000 students, and $200 was allocated for one year and then a percentage would be based upon an individual student's progress. It was interesting to note decision-making power in cities like Detroit it was decentralized to the individual teacher as to how to spend that $200. The teachers decided to spend in the neighborhood

of 35 to 40 percent on new learning materials and equipment as opposed to 55 percent on aides, etc.

Now, this is contrary to the official AFT position in Detroit. Now, do you see any problems of decentralized decision-making to the classroom where the teachers would decide to do something and that would be in conflict with what th official AFT position would be?

MR. McDONALD: It would be interesting to see what happens. I'm deliberately shying away from questions in which I have no expertise at all, and actually you're bringing up all the problems that are bound to occur.

QUESTION: Has an analysis been made of the present accountability system and can that be described? I raise that question because I have a suspicion that students are held accountable. So I'm just curious: before a new system is set up, whether the present system was subjected to analysis and whether a determination was made as to who is presently accountable for the results.

MR. McDONALD: Well, I can give you the benefit of our experience. We didn't do a detailed analysis because it seemed to us obvious that, in fact, the students were being held accountable, in the sense that they didn't do well it was because they didn't come from the right background or whatever you want to put in here. So what we did was try to get that whole approach to interpreting student results out, and what we're assuming is that the model that we have proposed clearly pinpoints who's supposed to do something about whom.

Occasionally, I'm sure that somewhere in all these analysis, if they get very sophisticated, you will get into factors of what they want to do in life with themselves and so on, but certainly it will be progressively harder just to blame all students who aren't doing well. Practically, we assumed that everybody was trying to figure out a place to put the blame on everybody else, especially the students and their parents.

QUESTION: Accepting your definition of an accountability system as one that identifes the causes of defective performance in the system--which I don't because it includes no sanctions as you have outlined it--but accepting that for the moment, looking at the three categories of school factors: faculty, programs and facilities; would you look at such things as classroom interaction, expectations, systemic processes, since you're fixating on processes--

MR. McDONALD: We're not fixating on them. They are variables that we are looking at.

QUESTION: Well, I mean, as opposed to product. That's really the point of this. Anyway, how do you examine and measure expectations which are critically important, and other systemic processes which relate?

MR. McDONALD: Well, you've got two questions there, one of which is implied. That is, would you, if you could; and the other is, how? The "how" is harder to answer because, again, the technology of measurement in those areas isn't very good. On the question of "would you," the answer is clearly and unequivocably yes, we will. We have given long lists of factors which are associated with each of these categories and those were sort of trial balloons, and in essence, what they said was, well, here are some things that we are pretty sure aren't going to have much correlation at all, but they don't threaten anybody. Further down the list, there are some things that are more likely to be close to learning consequences and nobody has raised any objections so far.

In other words, they have not precluded the possibility of accepting this model on the grounds that some day you might look inside classrooms and look at the nature of interaction. I think that day may come. Quite frankly, you have got to admit to yourself when you're in one of these things that you are in a very political process. If you talk to me as a scientist, I'm not supporting the notion of process to get away from looking at product. As a scientist, I am supporting it

because I know we don't know enough now to produce product, and what I hope we have got is a system that will lead us further in that direction.

But when you ask me what I'd measure, I'll go right down the line with you. I'm much more interested in direct instructional events than I am in the composition of the salary schedule, even though I think that's a variable; but I think it's pretty remote from some very immediate effects that you can measure, but whether anybody will permit us to do that I don't know, and that's where maybe the legal profession could be of some help.

QUESTION: Well, just one point. It seems to me that many of the efforts to establish accountability systems which aim at information and a greater understanding of why the system is failing are, themselves, counterproductive when they are limited to those measures which are politically acceptable, which in effect buttress possibly the systemic effect. I mean, whether it be Kenneth B. Clark or Charles Silverman talking about the roles of expectations, if you can't measure them now and it's politically unacceptable to measure those somewhat intangible qualities, while we're creating a great deal of interest in some other items that probably aren't that important.

MR. McDONALD: Yes. But my understanding of a conference like this, where you now have people other than just educators present, is that out of this will come a broader system of social action that will take care of this. Just look at this in very pragmatic terms. An organization like Educational Testing Service walks into New York City and says, "You ought to do this." They can say, "You know where you can go," if they don't like it. Now, do we sue them because they didn't follow our advice? No.

However, if you build a system in which information about the system is available, it seems to me it's certainly within the competence of other components of the system to bring the kinds of action

necessary; that is, why can't somebody start a suit saying, "You're ignoring certain kinds of measures which there's reason to believe might show a connection; therefore, you're ignoring factors that might have a different effect." I'm not a lawyer and I don't know the legal theory there.

Right now, you have got a school system which is a Byzantine palace. Nobody knows what's going on in the thing and if you want to work your way through a maze, I invite you to go look at school records and try to track individual pupils and find out. It's hard to get a handle on the system, as everybody says. If you can get a better bureaucratic system, it seems to me the larger social system might be able to control it. I don't know. Is that overoptimistic?

QUESTION: I'm very interested in product accountability and individual accountability and I'd like to ask you the following hypothetical situation. Assume I'm a legislator and I say to you, "It is terribly important to me that kids within a broad range of normal cognitive skills leave high school reading at a certain minimum level. I'm a legislator. I'm making that political judgment. It's terribly important."

Then, I ask you, as my expert, to give me some standard of what a reasonable way of determining that minimum level of competence might be. What I further ask you, as an expert, is would it be unreasonable to make, not individual teachers or even necessarily the school board, but our society accountable for the amount of money you would take to give that willing student when he got out of high school that skill if the school hasn't given it to him.

The thing that I'm having trouble with in terms--although I think there are lots of desirable things that could be accomplished by a process/product accountability system which you have designed, the think I'm really having trouble with is why wouldn't it be possible for kids who are willing to go to school an additional year, if necessary, let's say, or were willing to be tutored, if necessary--

why wouldn't it be possible to have a system in which there was social accountability to provide the resources that that kid at some point, if the schools hadn't provided him with some minimum level of reading skills?

MR. McDONALD: You're asking me really as a citizen what I think of that type of social theory, and I say, frankly, it sounds great to me, but I don't know all the problems in making it work.

QUESTION: Well, let me ask you a couple specific questions.

MR. McDONALD: And I didn't mean theory in the pejorative sense. You're holding all of us accountable and this does go back to the business of the sovereign in the democratic state and the sovereign is non-sueable. If you can establish that I'm accountable because I voted against tax issues or something, great.

QUESTION: Let me ask you a couple specific questions which I think do throw light on that.

Technologically, is it possible to give a willing student whose cognitive skills are within the normal range some minimum level of reading skills, whether you measure it by criterion reference testing or--

MR. McDONALD: Yes.

QUESTION: It is technologically possible?

MR. McDONALD: Yes. As a matter of fact, I'd say that you have to presume that something has gone wrong if you've got evidence that indicates the kid has no special handicaps, has normal aptitude, and he's reading poorly.

Now, the problem is establishing what the causes are. If you

can eliminate the fact that he doesn't want to learn to read, which is a funny kind of factor because it interacts with poor instruction--"I don't want to read because every time I go to read I get punished"--but it seems to me you could gather evidence on that. Then the standard ought to be any kid within a certain range of aptitude ought to be performing within a certain kind of level, and the burden of proof is on the people who are instructing him that he's incapable of that.

QUESTION: Within that light, can't you view the Peter Doe case exactly in that light?

MR. McDONALD: That's the way it sounds to me, but I'm no lawyer or judge.

QUESTION: Assuming California says, "We don't want kids graduating from high school without eighth grade level reading." Why can't you then go into court, not so much on a fault concept, but one that says, "Here's a kid who appears to be normal, who wants to know how to read, and who's gotten out of the school system and hasn't got it?"

PRESENTATION BY HASKELL C. FREEDMAN, JUDGE OF PROBATE COURT, MIDDLESEX COUNTY, MASSACHUSETTS: FORMER GENERAL COUNSEL TO MASSACHUSETTS TEACHERS ASSOCIATION; AND FORMERLY PRESIDENT-ELECT, NATIONAL ORGANIZATION FOR LEGAL PROBLEMS IN EDUCATION: "TEACHER RESPONSE AND POLICY IMPLICATIONS."

MR. FREEDMAN: I'm going to discuss teacher response and policy implications of the topic of the conference and, in a sense, I have a feeling that I'm here today representing Her Majesty's loyal opposition to the theory and rationale on the line of the pending suit of Peter Doe versus the associated defendants, including school boards and teachers; or at least I appear as counsel for the defendant relevant t aching staff and the board of education, but without negating my primary defense of the teachers.

I am not an educator and can only discuss this case from the point of view of one who has been a lawyer for nearly 40 years and for whom public education has been both an avocation and a vocation, as a school board member for nearly 16 years, and then as counsel to the State Association of School Boards, and later as counsel to the Massachusetts Teachers Association, all before going on the bench.

My judicial experience will have no part in this presentation as the court in which I preside does not handle educational matters, although it is quite possible that a bill of equity seeking a declaratory judgment for other relief might be applicable, but in that event, I probably will not be able to hear it.

I plan to discuss this case in the context of the six purposes of the conference as set forth in the brochure from the viewpoint primarily of counsel for the defendant teachers. Further, this case is in a court of law for decision and not in an educational conference; therefore, principles and rulings of law are applicable and they are fairly well-established. The freedom of the discussion available at an educational conference will not be available to the

plaintiffs in the forum of the courts.

Also, I suggest that in the courts lawyers use and judges understand the legal vocabulary and not an educational vocabulary.

Now, with respect to the critical word "accountability," I suggest it would be helpful to this discussion if we all could agree on what it means, and I seriously doubt if we can. There are as many interpretations or definitions of this word within the context of this conference as there are experts in the field. A dictionary says that it is "the quality or state of being accountable, liable or responsible," and a synonym given is "responsible."

In the current issue of the Harvard Law Review, Judge Irving R. Kaufman, of the United States Second Circuit, says, "Justice Cardozo, although himself an expert in the applicable use and manipulation of words, cautioned against the seductive lure of a well-turned phrase. Metaphors in law are to be narrowly watched for starting devices to liberate thought and they end, often, by enslaving it. So it is, as well, with these slogans and cliches that frequently emerge in legal vocabulary to take the place of hard thought and analysis."

And I would substitute the words "educational vocabulary" for "legal vocabulary" in the context of today's discussion.

It is incumbent upon me to use the word, and I will, but on my terms. That is, I suggest that accountability in the context of the suit can be regarded two ways: as legal accountability, a situation that first assumes a legal responsibility or duty recognized by law for breach of which the defendant might be sued; and educational accountability, which I suggest has no legal sanction and any alleged or proven breach does not warrant monetary damages.

Educational literature is replete with discussions of educational accountability and it appears to me that the rationale

underlying this suit is that particular interpretation of the educational accountability of teachers, aside from that of the other defendants that the plaintiff has selected, involve legal accountability, and otherwise, I submit there is no case.

I accept the proposition that teachers should be educationally accountable, but add that to try to hold the teaching profession solely or substantially accountable under existing conditions in our public schools is unjust, inequitable, and an attempt to use teachers as scapegoats for the failure of the educational process.

If the teaching profession is to be held educationally accountable, let alone legally accountable, then there must be clear goals for the schools based on both local values and priorities and national purposes; and secondly, acceptance of expert judgment and appropriate teaching and learning to achieve such goals.

It is clear that the meaning of accountability is complicated. It requires taking into account a broad range of conditions. It needs to be considered in the broad context of accountability under what conditions, accountability by whom, accountability to whom, accountability for what actions and outcomes, accountability to what degree and over what period of time.

I submit that without the answers to these questions, it is premature to attempt to hold teachers either legally or educationally accountable.

In popular terms, accountability means holding classroom teachers responsible for what their students learn or don't learn. Among the weaknesses of this approach is the fact that teachers are being asked to be accountable for results without having any appreciable voice in the governing of their profession. For example, with respect to the training, licensing, retention and dismissal of teachers, among other factors.

As Robert Snyder, of the NEA staff, stated in his article, "Accountability in the Classroom," the facts of the matter are simply that the teacher has either too little control or no control over the factors which might render accountability either feasible or fair.

The instant case is predicated on the theory that the defendants are legally accountable to the defendants for the son's failure now to adequately read and write, but it is an elementary principle of law that in a civil case there must exist specific rights and responsibilities known to the parents prior to the start of the litigation and a breach of which is alleged as a basis for the suit.

I will now assume that I represent the relevant teaching staff and respond to the stated purposes of this conference. The first is consideration of the legal arguments presented in the complaint dated November 20, 1972. My discussion of the legal arguments, pro and con, is based substantially on the issues as stated in the brochure and a brief reading of the complaint which I received two days ago after I had already prepared my presentation.

It appears, as lawyers say, that the complaint sounds in tort. That is, that it is based upon the principles of tort law and not of contract. No violation of any alleged contractual situation is involved. The plaintiff will have the obligation of, first, to cite the particular constitutional provisions and statutes that the defendants have violated, and for which a remedy is provided, to the harm or injury of the plaintiff's son, that will entitle them to monetary damages; and then, prove the facts by a preponderance of the evidence to support their contention that their son's legal rights have been denied or violated. And, with all respect, I do not believe that they will prevail.

The complaint sets forth an introduction and then alleges nine separate courses of action, all of which, by reference, include the introduction, state certain alleged facts and each cause of action

containing a variation of the main theme, namely, that the defendants are liable to the plaintiffs.

I do not question that the references to the California Education Code in the complaint are correct. Obviously, they are. But I did note that the complaint does not allege any pertinent sections of the California Education Code that provide any penalty for violations of the sections quoted.

Further, I question that the Federal Constitution guarantees any child the right to a successful education. The Constitution does guarantee the right of equal opportunity to an education and there is a distinction.

The Tenth Amendment to the Federal Constitution, as we know, provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. As the responsibility for public education was not delegated to the United States, it was therefore reserved to the States and always was and still is a function of state government.

I have not read the California Constitution, but I will assume that the portions referring to education to that extent, if at all, do not guarantee an education, although I'm not certain because, as I said, I have not read it.

The legal arguments in support of the suit are set forth in the brochure; namely, three essential points: First, that their 18-year-old son passed through the education institutions of the defendants but who, through the negligence, acts and omissions of the defendants, has been deprived of an education and the basic skills of our society; and lastly, they seek to recover money damages for the injuries caused by the defendants in the negligent, carelessness, and careless discharge of their constitutional and statutory duties.

To prove the case, I think the plaintiffs will have the burden of proving, first, establishing the law, the laws under which relief is sought, and that violation of such laws entitle them to relief; and then to provide by a preponderance of the evidence facts that will support the conclusions alleged in the complaint.

I am aware that several years ago, Dr. Sandow hypothesized substantially the instant case and sent this material to 200 individuals in the fields of law, education and government, and that 80 percent of his correspondents forsaw such a case arising within five years and succeeding. I grant the accuracy of his prediction with respect to the institution of the suit, but again with all due respect to Miss Martinez and these 200 correspondents, I seriously doubt the prediction of success.

I will pass the question of whether a demurrer has been filed by the defendants. I found out last night it has not been yet because process has not yet been served upon the defendants and after process has been served it will be in order for the defendants to reply, and they may well first reply by filing a demurrer. For those of you who are not lawyers, that is a pleading filed by a defendant either at the time of the filing of the answer or later, which in colloquial language says that assuming all that is stated in the complaint is true, what of it; that no real cause of action is stated.

So I will assume that the case has gone past that stage and is ready for a trial on the merits, and accordingly, will suggest defenses that I believe are available to the teacher defendants and not necessarily in order of importance.

The first is the defense of laches, a legal doctrine by which one whom might otherwise be entitled to relief may be denied relief because the person waited too long before bringing the action.

Secondly, the defense of respondent superior. The teachers

were not in control of the situation but were carrying out the duties assigned by the board of education and with such equipment, supplies, and supporting personnel as the board provided, and the board of education should be the prime defendant, if at all.

Then, I would suggest that no constitutional provision or law has been breached. I have not read the California Constitution, nor have I read the California Educational Code, which I understand is voluminous, but I am willing to say without having read these documents that I doubt if there are any penalties provided for any breach of the sections of the California Education Code relied upon by the plaintiffs.

Next, I would suggest that the charge is vague. Does the California Constitution or its Educational Code define education? Does either set forth educational standards of performance by pupils in precise terms that a teacher knows in advance his or her legal responsibility and the penalty for failure?

Another defense would be that the schools alone do not educate. A child learns from the day he or she is born. There is considerable authority to the effect that a child's behavioral patterns are quite well formed by age two and pretty much so by the time the child enrolls in school. The parents, the child's playmates, his environment, all bear upon his learning ability and capacity to absorb. Intelligence, per se, to whatever number on the IQ scale, does not guarantee that one will in school learn to one's apparent potential. Motivation, emotional stability and comparable factors substantially determine to what extent a child will learn and a teacher has little or no control over these very material factors.

Another defense would raise the question as to whether or not the schools make a difference. There are substantial writings on the question of whether schools do make a difference or to what extent they do make a difference in a child's education. The lead article in the March issue of the Atlantic Monthly, by Geoffrey

Godgsdon, carries the title, "Do Schools Make a Difference," and the writings by Jencks, Coleman, and Pettigrew and Armor are discussed. So there is now a legitimate discussion of the question of whether schools do make a difference and, if so, to what extent.

Another defense I would suggest would be that of contributory negligence. As the lawyers in the audience know, this is a doctrine of tort law, though not applicable in all states. If California has not abolished this doctrine in tort law, then the defense can set forth, namely, that if Peter Doe cannot adequately read or write, then he or his parents contributed to the result and the defense would attempt to set forth facts to support this defense.

Another defense suggested is that of sovereign immunity. The State cannot be sued without its permission. The California statutes may, to some extent, allow some sort of suits against the State, but I do not doubt the ability of an appellate court to find this defense valid here if they consider all the implications of a favorable result, and particularly to consider that defense in connection with the other defenses.

Another defense I would suggest is that of the separation of powers. Education is a function of the State. It is a legislative function delegated to local boards, and I suggest that the judiciary will not interfere. I remind you of Frankfurter's dissent in the case of Baker versus Carr which related to political reapportionment of voting districts, when he urged the court not to get into "a jungle of the political thicket," and I would suggest that the defense would well say to the court that it is not its duty to get into the jungle of the educational thicket.

Assuming that the case does not fall as a result of a demurrer being sustained or a motion to strike allowed, I believe that one or more of the defenses suggested--and I'm sure defense attorneys will think of others--will suffice to prevent the plaintiffs from prevailing.

The second purpose of the conference, as set forth, is to discuss the feasibility of pursuing this action in the courts and prospects for other related action. There is no point in my suggesting that the instant suit be dropped. Obviously, Miss Martinez and her associates believe in the case, and expect to win. My differences with her on this point are not unusual. If lawyers did not differ with regard to outcome of disputes between parties, there would be hardly any litigation and little need for courts and judges.

I suggest that not all inequities in our society--and certainly Peter has been unfairly treated--are remedied by the judicial process or capable of being remedied by the courts, and I think his case is one that does not belong in the courts and that the ultimate decision will be to that effect.

As to other possible related actions if this one succeeds, I can anticipate teachers or school boards suing parents for damages because of the parental behavior or failure to behave with respect to the child outside school hours that prevents the child from properly learning in school. Too many parents keep children up late nights, do not supervise homework, get drunk, create marital disharmony in the home to the detriment of the child's ability to concentrate on his school work, keep children out of school for invalid reasons, get divorced, injure the emotional security of the child, etc., etc.

Not only that, but yesterday's Boston Globe contained an item to the effect that the director of the Harvard University Center for Law and Education, a lawyer and educator, last night asked for a bill of rights for children and has organized a new group to be named The Children's Defense Fund, and said that parents should push for child neglect laws that don't already exist and push for enforcement of laws already on the books concerning children's education. And there is a movement now, particularly in divorce cases and custody cases, to the point that children should be

represented by independent counsel when their own rights are involved.

So where one or more of the conditions I enumerated above are present, I can imagine a child suing his parents if it's alleged the child is guaranteed an education by the Federal Constitution, which as I said, I'm not prepared to accept, unless what they mean is an equal opportunity to an education. The Gault case said that the Bill of Rights is not for adults alone, therefore, they also exist for the benefit of children. So why should a child not be able to sue his parents for the denial of his constitutional rights?

Such a suit, in my opinion, would be no more novel than the instant one. Surely, parents have a responsibility to assist their child's education or at least not to negatively interfere with it, and a parent's failure in this responsibility to the extent their teachers may be sued, why should not a cross-action be permitted by either teachers or the child, or both, against parents? Somehow or other, I cannot conceive the courts readily accepting these kind of suits.

The answer to Peter Doe's situation, in my opinion, is not to be found in the courts, but in the several legislatures of the states. There is a tendency to scoff at the American public schools today and to blame them for many ills of our society, but people forget or ignore the great and magnificent contribution of the common public schools of America, with all its faults, that have contributed to make our society what it is today, with its faults and its virtues, though I say that on balance its virtues prevail. But today is not the time to elaborate on that point, but neither should it be ignored.

The backbone of American education is the teacher. Teachers do not claim to be perfect, any more than lawyers, clergymen or the total membership of any group is.

The third purpose is a consideration of the range of effects that this case will have on the accountability mandates sweeping the nation. Until this case is decided in favor of the plaintiffs, I don't see why there will be any side range of effects. There may well be increased discussion of accountability in the educational arena, but that does not disturb me. That would be healthy.

I do not foresee any legal accountability. I think no one can precisely describe what education is or how it should be administered. The world of education is always in a tizzy over one new idea or another offered by those for or against the system in vogue at the time. Since 1950, I have heard the cliches, metaphors, words--"team teaching, homogeneous, heterogeneous grouping," "8-4 plan," "6-3 plan," "comprehensive high school versus open high school," etc., etc. --and the vogue today is "accountability."

There is always agitation and ferment in the educational world and that is good, and now the principle of accountability is a topic on everyone's tongue, but the discussion has all taken place in the educational world and they are talking about educational accountability, which I suggest is a different concept from legal accountability. I know of no comparable discussion of the legal accountability of the teaching profession in current legal literature and if we are talking about educational accountability, again, I ask precisely what are we talking about, so that we have a common understanding of the issue?

It cannot be a simple statement that because a child goes through the public school system and cannot adequately read or write at age 18 that all his teachers and the school board are legally accountable for that result. The doctrine of res ipsa loquitur is not applicable to this kind of alleged tort action.

In any event, if by chance the plaintiffs do prevail, I would expect that a definition or meaning of the legal accountability of educators will be a product of a favorable result.

I would further add that many states now, including Massachusetts, provide indentification of school board members and teachers when sued on account of causes of action arising out of the exercise of their statutory duties and professional responsibilities, and, again, in the event the plaintiffs prevail, in such state, the taxpayers would pay the damages; and in the states that do not have such laws, school board members will not be inclined to serve and teachers to teach unless such laws are enacted for their protection.

The fourth purpose is consideration of education as a process versus education as a product. I will not spend much time to this point except to say that education is not a product that can be measured, weighed, manufactured, stamped out, all according to precise standards. To say that, is to wander with Alice in Wonderland.

The argument that education is a product was considered in an article in the Saturday Review last October and the authors then asked: When a doctor or lawyer performs negligently, ignoring proper practice, he bears legal responsibility; when school boards, administrators or teachers behave negligently in their instructional duties, ignoring proper practice, do they bear major responsibility? Do they bear any responsibility? And I submit there is no analogy. To a doctor or a lawyer, the patient or client is a one-to-one situation. Education is not. There is much more than the teacher alone involved in education. One would have to untie the Gordian knot to isolate the various factors involved.

The author of that article further says that when consumer products fail to work the manufacturer or producer bears some legal responsibility for the failure. When teachers fail to teach, do the schools of education that produce these teachers bear responsibility for their failure? Similarly, when students fail to learn, are those responsible for their learning--schools, teachers, publishers and purchasers of educational materials--legally responsible for student failure? I would answer that, no.

Lastly, they say when a consumer purchases a car, there is implied warranty from the manufacturer and his agent to the purchaser that the car will perform certain minimal functions, and if it fails to do so, a suit will arise for a defective product. But I call your attention to the fact that if a General Motors car fails, the offender sues General Motors Corporation. It is the buyer versus the General Motors. The buyer does not sue the people who work on the assumbly line.

In the educational situation, the teacher is an agent of the school board of an employee of the school board and does not bear the ultimate responsibility for the process--which I will not call a product.

The author finally says that no one has definitive answers to these questions since they have not yet been raised in court; however, legal cases that would raise these questions are plausible; and he was right, because we have one; and he says that if the answer to even one of these is yes, a certain legal decision might alter the face of public education; and that is quite true.

Now, to consider the political implications of this suit. The question can only be answered, I think, on the assumption that the suit will be successful and that until that time I see no political implications. There is one suit that really held for the teacher which is not exactly the same as this one but close to it, where a teacher in Iowa was notified by the school board ther her contract was terminated after she had taught in the system for ten years. The school board finally decided to dismiss her. She went to the United States Court, where the judge said, "The specific reason given plaintiff for termination was her professional competence as indicated by the low scholastic accomplishment of her students on the Iowa Test of Basic Skills and the Iowa Test of Educational Development. A teacher's professional competence cannot be determined solely on the basis of her students' achievement on the ITBS and the ITED, especially where the students maintain normal educational

growth rates."

This case is not in point but is close to it. Assuming the plaintiffs prevail, then I would anticipate, first, a plethora of similar suits across the nation. If there are about 40 million students that attend the public schools of America and if we conservatively estimate that probably 5 percent are having an unsatisfactory--which is a euphemistic word--experience, then one might anticipate 2 million parents bringing suits claiming damages.

It would require a political revolution in the field of public school education. This revolution would involve reconsideration and analysis of the training of teachers and administrators and the administration of the schools and a complete review and overhaul of the present system. It would cost potentially billions of dollars. It would open Pandora's box and once opened it would not be closed, and it would substantially--very substantially improve the economic status of the American lawyer.

The next purpose is to take a hard look at the educational leadership from the responsibility for access to the responsibility for results. In the first place, I do not agree that the educational leadership now has any responsibility for access. The responsibility for access flows from the power that the states have over public education by virtue of the Tenth Amendment and the constitutional provisions of the several states and the state statutes. The educational leadership has no responsibility for access. They have no power to make children go to school. That power belongs to the state, to the legislatures of the several states, although it is delegated and exercised by professional educational personnel.

Accordingly, if the suit is successful, I do not see any transfer of educational leadership responsibility for access to educational leadership responsible for results; but, rather, a transfer of state responsibility for access to educational leadership for responsibility for results, and that transfer does not

make sense.

If the educational leadership is to be responsible for results, then it should have the power to determine what students should be admitted to the public schools and power to determine what students should be excluded. One can analogize such a situation to what caused the Boston Tea Party. Taxation without representation.

For the reasons suggested earlier when I discussed possible defenses to the suit--namely, that the public schools, at least in Massachusetts, are required to admit all children, those with IQs as low as 30, emotionally and physically handicapped children, motivated children, unmotivated children, geniuses and dopes--how can one hold the school board and teacher accountable when in far too many cases what the parent expects and wants the school to do for his or her child is not always possible or consistent with the potential of the child, which the parent usually is the last one to recognize?

I conclude by suggesting that the suit and the questions involved are provocative and although, if asked, I would advise against bringing the suit, I do compliment Miss Martinez and her associates for their imaginative and creative thinking in drafting a bill of complaint and their willingness to institute suit.

I have an appreciation of the failure of our schools in too many cases when they should not have failed. At the same time, one must realize that not all children can necessarily succeed in the public school situation; and as to the situations where the children should succeed but do not, the fault is not necessarily always that of all the teachers. Obviously, there are incompetent teachers, as I said before there are incompetent lawyers, doctors, dentists, clergymen and what-have-you. However, the latter situation is a one-to-one relationship, an ad hoc situation, doctor/patient, lawyer/client, and the person aggrieved has a remedy through professional associations or even in the courts by statutes that entitle them to relief.

But I suggest that that situation is not true in education. Not since Mark Hopkins sat on a log and a student sat on the other end has there been a one-to-one situation in our public schools. In too many of our schools there are over-sized classes, antiquated buildings, a lack of necessary supplies and equipment, and a lack of required supporting personnel. The teachers are not responsible for these conditions. Neither should they be held responsible if under such conditions or variables of such conditions some children do not learn.

DISCUSSION

QUESTION: This suit is against the school board, the local public school system, not against the teachers.

MR. FREEDMAN: Yes, but 100 John Doe teachers are named as defendants.

MS. MARTINEZ: Not 100 teachers. There's 100 John Does.

MR. FREEDMAN: 100 employees of the district referred to as the relevant teaching staff.

QUESTION: As against the school system, how sure can we be that the rationality of res ipsa loquitur would never apply if you assumed the situation where the person who's been in school all the way through high school couldn't ever learn the alphabet, couldn't count to 20, and that situation had never been called to the attention of the parents? Wouldn't there be a basis for the application of the doctrine of rationality of res ipsa loquitur? This situation here is merely one of degree and we don't know what the exact facts are.

MR. FREEDMAN: I'm not a specialist in tort law and I remember very little of it, except from my law school days a long time ago. What I remember of res ipsa loquitur requires that the defendant would be in sole, absolute, independent control of the situation that caused the injury.

QUESTION: The defendant being not the school teachers but the school board.

MR. FREEDMAN: The board of education.

QUESTION: They are to be ultimately responsible for the local public school system.

MR. FREEDMAN: No, because I think the defense would be that there's more to it than the board responsibility. There's the home environment. There are many other factors that are involved in education besides the mere five hours a day in school, and I don't think the res ipsa loquitur doctrine applies. The child is learning all the time outside of school. The negative factors that may prevent him from learning in school he may have acquired outside the school.

QUESTION: Then they can always come back--

QUESTION: My understanding is one of the questions in this suit is the fact--and I don't know whether this is a fact or not--one of the facts alleged is that the parents were never apprized that the child was not producing, which is a different situation than a child who can't produce. The parents were not apprized of that fact. Is there not some responsibility--

MR. FREEDMAN: I'm not questioning that Peter Doe has been hurt. I'm not questioning that he got a raw deal. I'm not questioning that his parents got a raw deal. I'm merely questioning whether they have legal redress against these defendants, and that's not the first case in our society where people have suffered harm without being able to remedy them.

QUESTION: I'm not a lawyer, but I understand that the Iowa case that you mentioned, the Supreme Court found a person couldn't be fired because results on tests were attributable to some deficiencies in that specific test, not necessarily all standardized tests.

MR. FREEDMAN: I didn't say that case was entirely similar to this one here, but it did touch on it where they sought to fire a teacher because certain children didn't perform up to the norms that were established.

QUESTION: I believe you said at one point that you didn't think this was really appropriate to be resolved through the courts, but you did allude to legislative action. Would you spell that out a little? What do you think a legislature might do if its object was to increase the level of learning of basic skills, say, particularly for perhaps low-income kids who are the kids who, by and large, seem to be at the bottom of the heap here?

MR. FREEDMAN: In line with the other suggestions made earlier today, as to methods and procedures that would more effectively guarantee or ensure a child such as Peter to acquire these skills, the legislature should vote the funds to implement these programs. We are all familiar with the fact that to get money for education is a horribly rough thing today, and you're from Massachusetts so you know what is going on there and you are familiar with the Boston school situation. It's a question of money. The legislature provides the money and it's their responsibility, and what you're really saying in this case is that a person, in a sense, is suing the state. I don't think the state will accept that kind of a suit.

The theory of sovereign immunity goes back to the old doctrine that the king can do no wrong and when the king wants to take advantage of that position he will, or at least I think the courts will.

As a practical application, what do you think the appellate court is going to do with this case when it hits it, or the Supreme Court of the United States? To find for the plaintiffs would open up a potential of two or three hundred thousand comparable suits. It's just unrealistic politically even to accept it.

Charles Evans Hughes, years ago, said, "The Supreme Court follows the election returns," and there's a lot of truism there. I would also suggest that appellate judges understand the financial facts of governmental life.

VOICE: Let me offer a hypothetical opinion: going through your defenses, I'd say that the sovereign immunity is no defense on a constitutional issue and that in view of the California statute that that's not applicable here.

As far as your question with regard to respondeat superior, I find in your favor at this point, but I want to make clear that I'm not ruling that a board of education--where a suit such as this has been brought, a board of education may not set standards and apply them on whether to retain or fire a teacher.

The offer of proof on the demurrer in the complaint is sufficient for this stage in the proceedings and that would not be an objection to letting this action proceed.

As far as contributory negligence, the child himself cannot in this situation be charged with contributory negligence because of his age. As to the parents, the facts do not support an argument of contributory negligence because they inquired into the process and the institution did not respond.

With regard to the question of laches, we have a problem. Let the proof be put in before we make a judgment on that defense.

We do have a problem with the relief requested, specifically damages or in terms of money, and not in the form of declaratory or injunctive relief. We are aware of the cost or financial burden which would be imposed upon the state if we were to allow all students to recover monies without allowing boards of education the opportunity to correct the wrongs in the system.

We come now to the particular plaintiff involved, and that is a plaintiff who is no longer in the educational system but somebody who has left the educational system.

Coming back to the relief requested, we find that we could not give money damages. The most we could find would be that should the complaint be amended to request supplemental education programs to be borne by the state or, for a student who is in the system, to require declaratory relief or injunctive relief requiring the school district to give some remedial relief and apply the results of the tests which they have been instituting, we do not form a judgment at this time.

We dismiss the complaint at this time but leave the plaintiff permission to replead with a different request for relief.

MR. FREEDMAN: Excuse me, but boards of education alone cannot correct the conditions because frequently boards of education are not fiscally independent. They are dependent upon the municipality or other sources for their money.

QUESTION: Isn't the State of California the defendant in this action?

MS. MARTINEZ: Yes.

QUESTION: Would you believe the same if the suit was against the school board because somebody was injured by a bus which was negligently maintained? Could the school board argue that the reason that they--as a defense--that the reason they didn't maintain the school bus was because their budget had been cut; whereas last year they had 500 people taking care of thes and this year they only have 10? The suit would still lie, wouldn't it? There would be no defense that you could hide behind the legislature.

MR. FREEDMAN: I would agree with you that the school board would be liable, but the law of negligence of torts is clearly established and that would not be available.

QUESTION: But the mere fact that they are not in control of the situation would be no defense.

MR. FREEDMAN: No. They do have--

QUESTION: That they couldn't vote themselves the money?

MR. FREEDMAN: They do have a certain amount of money for bus transportation. They could have chosen to run fewer buses. They did not have to run the maximum number of buses, some of which were defective.

QUESTION: Somewhat in line with that, I just wonder to what extent your objections would largely fall away if the theory were not one of negligence and if money damages were not the remedy sought. That is, to what extent are you opposed to the concept of holding a school system accountable in principle, and to what extent are you opposed to the particular formulation of this lawsuit?

MR. FREEDMAN: I speak here only narrowly, as a lawyer defending teachers. As a lawyer defending teachers in the context of this case, I think I can use and assert every possible conceivable defense. I would use every strategy and trick I have in my command to win the case. As a lawyer for the defendants, I'm not involved in an intellectual discussion of the situation. My client is being threatened with a suit for money. I'm not here as her lawyer to get involved with the educational theoretical arguments. All I want to do is save her from harm.

PRESENTATION BY THOMAS F. GREEN, DIRECTOR, EDUCATIONAL POLICY RESEARCH CENTER: "PERSPECTIVES ON THE LANGUAGE OF EDUCATIONAL POLICY AND CHANGE STRATEGIES."

MR. GREEN: I'm going to speak very briefly and very simply. I want to simply lay before you three or four claims that I hope will place this case and the controversy surrounding it, and the controversy that's likely to emerge--discussion of which we have heard today--in some historical context.

I probably ought to say that I start from some assumptions. I start from the assumption that I feel is confirmed by my own personal experience and the experience of others, that the world is pretty complicated and, also, that it's likely to be, from time to time, pretty cruel; and indeed, that it is more often than not likely to be unjust.

I insert that because some of the things I want to say may seem to you to be excessively hard, and to some of you, I'm sure it's perhaps downright immoral. But I want to make these statements because I believe that they raise issues about the conceptual problems that we are confronted with in dealing with this problem.

The first assertion I want to make is that success leads to problems. I want you to place yourselves back in a period of time somewhat earlier than the period that Haskell has talked about or drawn on in the way of precedent. Imagine yourselves at the beginning of the century. It seems to me extremely unlikely that this case would arise with the same kind of social ideological persuasiveness in 1910 as it can arise in 1970, and there are a variety of reasons as to why this may be so.

For one thing, we have gone through a period of fantastic growth in the educational system in this country to a point at which it can be argued that the system that we spent nearly a hundred years developing has now reached a stage of maturity. Some people would

say senility. And that both the social values and the area of public policy which led us originally to develop that system of education now no longer suffice to justify it. We are, in effect, in the position of the person who's playing the old familiar game of the "answer man." "Here's an answer. Tell me what the question is." We now have to answer to an educational problem. It's taken us a long while to get it and now we've forgotten what the question was.

We have a system. The kind of motivation, social movement that produced it was a peculiar alignment of friends of youth, allies from business and industrial community, people within political sectors of our society which could be allied, and certainly roughly drawn coalitions existing from the 1860's or 1870's up to the middle of this century, which have in a sense accomplished many of the goals that they set out to accomplish.

We are now entering into a period in which the growth of the secondary system in the United States is going to level off. It's not going to grow proportionately to the size of the school-age population any more, and as that occurs, certain things are likely to happen. Let me list some of them.

First of all, what counts as an educational benefit is going to change. When Jefferson articulated certain notions about why we have public education in this country he didn't really articulate a very large system. Three or four years of education was enough to give you the rudiments, to give you the normal activities to enter the social system which was the arena in which basically you received your education, except for some kind of natural aristocracy. He acknowledged there was an extraordinary range, if we were to view it this way--an extraordinary range in the distribution of what kinds of educational benefits anybody would get from going to school and, for the most part, education wasn't lodged in schools in his mind.

As we imagine the emergence of this comprehensive secondary system that we developed in the 20th century, reaching a point of its climax, there's one very significant thing that is likely to happen at about the time when you emerge into the last 20 percent increase in the growth of that system, and I would suggest to you that one thing necessarily will happen--it happens to occur in most countries that proximate the stage of educational development that we have in this country--and that is that there will be a very interesting transformation in the relationship between what you gain socially from completing your education as over against what you suffer from not getting it. That is, the relative advantages that you gain over other portions of the population by having a high school education are going to fall to negligible size. The liabilities that you are going to suffer from failing to finish a secondary education are going to grow astronomically.

To put it another way, I'll say something rather uncharitable. When you view it from the point of view of the national or aggregate state of the educational system in this country, it could be argued that the reason we have a dropout problem in this country is not because we have lots of dropout --because we have had fewer and fewer for 70 years--but we have a dropout problem because we are reaching the point where we don't have very many; and under those circumstances, being one is a hell of a disaster. It becomes a real social liability.

That's one of the reasons why the failure to learn minimal things within the educational system proves to be a very serious desperate liability to an individual now, whereas it may not have been anywhere near as serious a problem in 1920 or 1940 or even in 1950.

Equal educational opportunity means different things as the system expands. It is likely to mean that it is, on the one hand, in the early stages of the development of education in the country, one of the first ways equal educational opportunities was interpreted

is that you must provide some schools for every child. If there are some youngsters who don't have a school they do not have equal opportunity.

Once you reach the point where there's a school for every child, you're likely to discover that they don't all have equal services, and if they don't have equal services you're likely to insist that they don't have equal opportunities; and when you get equal services you discover that they don't have equal results; and when they don't have equal results you're going to discover that probably the relationship between the results you do get and equal life chances doesn't balance out.

So I'm suggesting that as a part of the mere historical development of the educational system there is a process whereby equal opportunity means different things at different stages, and this case is an expression of the fact that we are at a very advanced stage in that process.

We are beginning to focus--whether the judge agrees or not--on the area of social thought, policy formation, and the allocation of public resources. We are beginning to focus on, not the problem of equal access, but the problem of equal results.

Similarly, one is likely to find that the issue of accountability is going to mean different things. I suspect that the requirement that the schools in Massachusetts be open to everybody is not in fact a requirement which was always there and it probably was not a requirement that was there during the period of time when there weren't very many youngsters. In short, the accountability any district or its school committee, as in that state, has to yield to will be first probably an accountability to provide some services to everybody. It will eventually turn into an accountability to make sure that there are some comparable services, and then you will begin to get a different kind of accountability.

We are just now, I believe, emerging into a period in history within which the issue of accountability is not going to be inputs but outputs. It's going to be, for the first time, assessment on the quality of the educational process.

Let me suggest one other kind of related observation. It is sometimes said that there's a problem as to what the significance of the high school diploma is. Here's a youngster who has a high school diploma and it doesn't represent anything, although it's used for certain purposes within the society. I would suggest to you, similarly, that one of the conditions that has to be satisfied in order for the high school diploma to be used as a screening device for entry into employment is that there are one whale of a lot of people with high school diplomas. In 1910, if you were running a country store and you were looking for a youngster to help you, if ten young people applied for the position and only one of them had a high school diploma, you wouldn't be likely to reject him or reject the other nine simply because they hadn't finished school. You are not likely to do that under conditions where five out of ten apply and only five have the diploma. But when eight out of ten come in and they have it, it's very much more likely that we would apply the diploma as a screening device.

In short, the rise of credentialism and the meaning of that diploma as a social credential as a kind of negotiable instrument is also very closely related to some transforming metaphors and some changing ideas about what the value of that experience is supposed to be.

One last observation connected with this same point. I'm suggesting to you, in short, that success breeds problems; that the drop-out problem is the consequence of the fact that we have had an extraordinary amount of success in getting a lot of people through the secondary system; that credentialism is a consequence partly at least of the fact that we have had an extraordinary amount

of success in expanding that educational system to incorporate everybody.

One last observation about that same transformation. It happens to be true of every developed educational system that I know of in the world, with one conceivable exception, that no society in the world has ever been able to expand its educational system to include people within the lower class or the lower income quartiles in proportion to their numbers without first saturating the system with people from the upper classes within the upper income quartile.

In other words, it is possible for any society, depending upon the structure of its educational system--and then it would occur at a different point--but it is possible to formulate a general rule which will describe which people will benefit first, second, third and fourth from any given expansion of the system. So, if you approach a point at which you're in the last phase, as it were, to the completion of the secondary educational system, you're likely to find, among other things, that the group of last completion that I referred to will be from the lower socioeconomic groups within society.

Now I'm going to get to the case here in a moment, but the point I want to make is that that seems to be an extremely intractible element of the behavior of educational systems in general is purely a contingent fact. I don't see any reason in the nature of things that that should have to be so. Certainly we don't assume that talent is distributed along those socio-economic criteria. Indeed, graduate school enrollments are in fact distributed in exactly the opposite way. They are predominantly from lower middle-class and lower-class people of those family origins.

The point I want to make with respect to the law of last entry is that as you press on to the final stages of any educational

system, at some point that is regarded as terminal, you're likely to produce the problems which we have in the United States today and those problems are likely to be accompanied by insistence once more on accountability. Success breeds problems.

By the way, let me add just one last comment. Please note in the process of this that the meaning of compulsory education changes. It changes, in fact, from a circumstance which was originally imposed as a matter of legal obligation, as the parents could be held accountable, and it's rather interesting that three years ago when I did a little telephone survey, a little study in the State of Massachusetts around Boston, trying to find out when was the last time and what was the nature of the cases that appeared in courts with regard to school truancy, the only ones I could ever find that ever really appeared in court were on the part of parents who would be judged by any reasonable man to be quite competent to educate their own children. They were brought into court to be held accountable for not having their youngsters show up in the schools, whereas in the City of Boston it was easy to arrive at a figure of somewhat over 4,000 youngsters who were out of school all the time.

The nature and the function of the law here is anachronistic. It had not yet kept up or transformed itself to accord with what had become a changing social meaning of the concept of compulsory education. My suspicion is that you could remove compulsory education laws completely and it wouldn't affect school attendance very much at all. It's not a source of your compulsion of going to school.

The second claim I want to make is really in the nature of a question which flows from these remarks already and that is, it's only under certain social circumstances that this case which we're dealing with today is likely to arise. I have already said some things about that. What's involved in a case? Well, people lose,

but people have always lost. I start with that assumption. One can say, as Jim Kelly did this morning, the system treats individuals badly. Well, that's true, but, I would invite you to read some accounts of schools in the 1880's and reflect on whether they treat the people very badly now.

That isn't likely to make a case arise, when people are treated badly or some people will lose. I think what's likely to make this case arise only in certain periods and not in others is the fact that that completion of the secondary certificate is just damnably crucial and the fact, secondly, that it is supposed to represent at least some minimal level of achievement. It is supposed to represent at least some stage at which an individual is to be functionally literate.

I think it's important to keep in mind that this case deals not with education in a very real sense, in which it deals with a very concrete specific thing that can be asserted--that is, a reading level, a sufficient reading level to allow one to do some very elementary things--though I would agree with what Judge Freedman said about the nature of education, I would not agree and, indeed, it does not seem to me reasonable to take those ambiguities and say that the assertment is whether a person has a reading skill at a certain level is all that difficult to fix. It isn't that difficult to fix.

The suit deals, in short, with minimum standards and with the social significance of having those minimal standards.

The third claim I want to make is about accountability and I suspect that won't be around very long as an issue. By the way, accountability is not just the discussion in the educational community. It probably wouldn't be a discussion in the educational community at all if it weren't a hot issue in the legislatures.

But to get back to my point, I don't think it's going to be around as an issue very long because if it really is a serious aspect of the nature of our educational process then transforming it will have to go far beyond reading comprehension skills and so forth. It will have to go beyond those issues which are filled with such political controversy, which are so much at the heart of those things that are essential to education. I doubt very much that accountability as a basic feature of the system that goes beyond the determination of certain minimal standards is likely to be a hot issue within the policy arena very long.

Let me make one last observation. That is, that along with the general view that the world is, after all, pretty cruel and unjust and complicated, I think I would also at least throw out the following hypothesis: There are severe limits in the degree to which we can ever anticipate changing the distribution of achievement either within the schools or outside of it or any way whatsoever.

There's only one movement that I know of in education which really addresses itself to that problem, and that's really the problem of accountability, and that's the mode that is sometimes described as massive learning. It's rather interesting that in the idea of massive learning everybody can achieve the same level, but the trouble is, it takes them anywhere from one to five times as long. It's rather interesting that the standard rule of thumb has always been distribution of achievement is about one to five.

I'm just pointing to the fact that there's something terribly intractible about the distributional characteristics of who appears at the bottom and who appears at the top in some scales of achievement.

I take it what this case has to do with is the demand that there be some kind of minimal point in that distribution of achievement with respect to certain skills below which nobody should be permitted to fall. That's the issue. It carries with it, then,

the implication that it is possible to attain within the educational process the conversion of pedagogy into a kind of technology. That is, it does carry with it the implicit assumption that there is a way of providing a floor in that intractible distribution, a bottom below which nobody will be permitted to fall.

I think this is a highly debatable questionable assumption. Imagine what would be the case, in fact, if you could find the technique which would assure that every youngster coming out of the school would be able to read at a certain level. That would begin to represent something like an extraordinarily powerful technique, some extraordinarily powerful device. I'm not sure it would improve the relative position of anybody in that scale. I'm not sure that the people who attain that minimal level would be any better off in the social world around them than they are now, because any time you can develop such a potent educational technique as to guarantee that nobody is going to fall below a certain level in reading skills, I'll bet you that that technique is going to be applied by those people who are already at the top of it and the range in the distribution of achievement is going to become extremely great.

What I'm suggesting is that the social problems confronted with this--the social difficulty--the nature of the disaster, the nature of the harm that was done to this young man, is probably not going to be improved--is not probably going to be met and is not probably going to be remedied by the introduction of such a technical skill, such an improvement in pedagogy. I think that's unfortunate. I don't see that, in short, as a solution to the issues.

Let me make one last quick observation. That is, I don't think it should be lost sight of and I think it has been lost sight of that there are some things in the story of this case which are just plain wrong. If there's no redress for just plain

incompetence, stupidity, laziness, etc., on the part of people within the educational system, then I think we have got to go beyond the point of looking for a mode of accountability in an era within which our whole language about education is going to change. We are going to go beyond that. We are going to have to begin to find new legal metaphors, new legal arenas within which the language can be tested, some new language that is going to eventually transform what law will admit.

This seems to me is what in the long run of history is what goes on within the courts and within litigation.

I hope this is not taken as an uncharitable remark, but as the judge was talking I was reminded of my acquaintance with a good many people in legal colleges, in law colleges around the country, and the fact that I'm extremely impressed always with the certain intellectual quality that they represent, which is the disposition to define a problem first of all very specifically, which is a marvelous thing because it makes you think concretely about the issues; but, secondly, their incapacity to look very far back into precedent to be impressed with the fact that there may be brand new ways of taking a look. There may be, in fact, new precedents. There may be new metaphors that are constantly emerging in the law, new metaphors and new analogies under which redress might be sought.

I have in mind specifically the things Susanne said this morning about the teacher who commanded a certain book to a youngster because she liked the material in it, even though she knew he couldn't read it. That is really stupid from the educational viewpoint.

DISCUSSION

QUESTION: One of the interesting points you were making in the beginning has a lot to do with where we are and what we are. You were talking about the development of systems and that we have developed a secondary system. Maybe as a class among nations, we may have, but then, going back to the individual, I'm not sure that we have developed within this group here.

Unfortunately, ESEA made the assumption that there was a highly developed system and, therefore, that what was necessary was remedial programs without considering whether anything had been developed in the first place. This is what we often get hung up in, examining where we are in the development process and maybe redefining for further development as opposed to coming in and saying that we need remediation without even really having a system of development.

MR. GREEN: Let me just make one point in connection with what you're saying. That is, that when I say a fully developed system, I'm saying that for a long, long while in this country the motivating force, the ideology, the sort of basic fundamental beliefs that led to the development of that system of comprehensive institutions was one that the benefits of those are to be accomplished by everybody attaining a certain level; and that was predicated on the assumption that in a previous period of history it was discovered and has been asserted repeatedly since then that attaining at that level brings certain differential benefits to you subsequently in life.

Now, there are two assumptions involved in that general value or ideological position. One is that everybody should benefit from the same educational system as those who had previously benefited from it. Once you accomplish that, you will have destroyed the basis upon which that policy was implemented because as soon as everybody goes through it there won't be any differential benefits.

So when I say there's a mature system, I'm not suggesting that there's a mature flexibility and an elaborate infrastructure or administrative system. I'm suggesting only one thing, and it's quantitative and it has to do with attainment. That is, that the reasons within the American culture, within the American society, for the constant expansion of secondary education were reasons which had to do with access and attainment and it was assumed throughout that certain benefits would flow.

Once you reach the point where those benefits are no longer available differentially to those who finish the system, you've got to turn yourselves to the problems of control. It's the natural next step.

So I would agree with you that ESEA did assume that there was a manageable system or it could be strengthened.

QUESTION; I'm thinking of Title I particularly.

MR. GREEN: All right. You're reiterating, in a sense, the development of the thesis I was making. Another way of putting it is to say that once you reach a certain stage, at least within the American scene, the fundamental question now becomes what is it that these institutions are good for? Are they good for their results? Are they good because of the nature of the process within them? What are they good for? I think that's a fundamental transformation that will occur.

QUESTION: I hear you saying two things. First, that in a relative sense, there's always going to be a bottom quarter and that even though one might raise the floor there's still going to be people that in terms of achievement are going to be in the bottom quarter, and the social disadvantages of being in the bottom quarter may not be much affected by moving the floor.

Second, in this particular case, it's really pretty outrageous that we don't have a floor that is high enough to support Peter Doe.

Now, what I'm wondering is, if you were advising a legislator--taking this out of the context of the court for the moment--what would you think about a legislative floor which implicitly said, "Whatever else we do with our educational resources, we are going to make sure we have spent enough to give someone the literacy to read, not the New York Times perhaps, but the New York Post."

Could you speak to the social issue and the economic issue of whether this would be a very rational thing to do?

MR. GREEN: Well, first of all, let me clarify one thing. I'm not saying that it's unfortunate that Peter Doe has the level of reading that he has. What I was saying is, what seems to me an absolutely intolerable condition to have to put up with is the incompetence in the system that Susanne described. In other words, I'm saying I don't believe, frankly--I'm not optimistic about the possibilities of improving the position of people at the bottom in that distribution, but surely, nobody should have to put up with the stupidities and the incompetence of the kind she described, and I think that's part of what Jim Kelly was talking about.

Now, with regard to the legislator asking what do you do to affect the bottom of that, I would frankly say two things. One, I would not necessarily buy the assumption that it ought to be done by the schools, since, after all, the assumption that somehow the school system is the mode of education is part of what has produced a lot of these problems. So I would encourage them to explore what some other assumptions are and then, secondly, I suppose I would encourage them to explore what the technical difficulties are in those other assumptions.

QUESTION: If I could just focus a minute on the employment sector and assume that the social aspects of education relate only to employment, would you think it would be fair to say that as the job market generally becomes more sophisticated and the demands more sophisticated, skills that the education system defined, however broadly, as appropriate ought to move in some kind of lock step; that is, at least the lower quartile of those coming out of the education system ought to be eligible for the lower quartile of jobs in terms of their sophistication; and the social problem occurs when they fall out of sequence or out of synchronization, where those in the lower quartile coming out of the education process can't even reach the lower quartile of jobs?

It seems to me that's one way to view the two historical trends.

MR. GREEN: As a general principle, I would regard that as one of the conditions under which you would say the system is relatively just in its distribution of whatever goods it distributes, in this case, certain skills. I agree with you.

QUESTION: And I suppose the only other thing is whether the education system, in determining who falls into which quartile end of the process, merely engrave in stone the situation it first comes to grips with; that is, if you can take the lowest quartile by socioeconomic factors and assume they are going to wind up in the lowest quartile at the end of the education process, then what the process has accomplished is at least limited.

MR. GREEN: Yes. There are two assumptions you're making. I would agree that would be a better system. It would be a better match between the educational system and the employment sector, I would agree.

There are two assumptions you're making, though, that I would want to seriously examine. I don't know what the answers are. One of them is, is it necessarily the educational system that should be charged with the responsibility of making that match? I think that's an open question.

Secondly, the other question I have is whether or not in fact the assumption that those levels of skills are necessarily more sophisticated. I'm terribly impressed, living in central New York in a rural area, knowing what I do about the level of sophistication and the certain knowledge that people had in 1840 about things that practically nobody knows about today. What goes under the heading of increasingly sophisticated skills is very often simply a displacement of certain skills for others.

The old skills used to be learned very often outside the schools, provided by the society in certain other ways. Let me point out again, I repeat, that being a dropout in a society where 50 percent of the people are dropout is no real problem because what that means is that the society is obligated somehow to provide alternative activities to being in school and providing those alternatives is likely, even willy-nilly, to provide chances for people to increase their skills. It did happen that way.

But by assuming that all of these things somehow must be lodged in the education system and that the expansion of that system is the way in which you do it, you do all kinds of things to the relationship between the school and the rest of the society simultaneously, and that means then that you have to rethink what that system is for operationally, and that's where I see these kinds of cases serving to force us to reexamine where, by what means, by what institutional devices, we seek to accomplish the balance between skills and employment and lots of other things, too, that we were seeking originally.

QUESTION: I guess I'm just reacting in part to the notion that increasingly is being aired, that let's not glamorize or put into more favorable light the way the public schools used to operate, because they have always been bad and, as you point out, maybe they were worse; but my only feeling is that maybe we have to view the grocery store clerks of 40 years ago as the computer programmers of 10 or 20 years from now. Maybe those will be society's menial jobs, but obviously at a somewhat higher level of sophistication.

MR. GREEN: Why do you say "a higher level of sophistication?" Who were the second generation computer programmers? First generation computer programmers were engineers or mathematicians, but the second generation were people who couldn't have possibly had any training in it. How did they do it? They couldn't conceivably have done it through the schools or any educational institution.

What I'm suggesting--I keep hammering away at this--don't get the idea that the minimum is somehow more sophisticated and therefore somehow should be done within the school system. I don't know that that's any more sophisticated than all kinds of things that people used to learn 100 years ago. I'll agree that the requirements of those roles, of all kinds of adult roles, do change.

There is an argument, in short, that I don't know if anybody that really holds to except people in education, and that is that as the society develops, becomes more complicated, becomes more organizational, etc., more technologically oriented, the skills required are more sophisticated and therefore they require more education. I can't think of a shred of evidence to justify that, but I can see an awful lot of public interest or self-interest on the part of people who say this.

Take another hypothesis, another one that was mentioned today. Why not have the society provide some legal claim to reach a level, some kind of minimal level, in a year or two after completion

of high school? My answer to that is, if you can do it in 13 years, why can't you do it in 12; and if you can do it in 12, why can't you do it in 11? What's so magic about 12 years, to begin with.

This kind of problem, where you meet the minimum standards and what that means must be divorced from the idea of completing secondary education is what I'm trying to get at, and, therefore, these issues don't all get lodged in the system. They have got to be examined in the light of what other institutions can contribute.

QUESTION: An important assumption underlying a lot of statements you're making was the normality of the normal curve. Perhaps most people are aware that it's really called the curve of error except in distribution of high ground.

One of the statements you made is if we raise the minimum threshold of learning you will still have a long dispersion of people over a long route, but that's not necessarily so.

MR. GREEN: No, it isn't necessarily so.

QUESTION: By individual instruction they found differential effects. Guys behind in learning and slow learned a lot from that program. Kids who were bright to start with were bored and didn't make any improvements. In the study in Virginia the kids far behind did not make fantastic gains but that same treatment was very effective for retarded kids.

So you're talking about a very potent powerful technology or technique which may not have the same effects and just maintain that normal distribution. It's possible it may only have effects for certain kinds of people at certain stages. The most important point about mastery learning is that it reduces variances. It reduces that spread, not that it perpetuates it merely at a higher level.

MR. GREEN: Yes. I have argued in other places at other times that if you were to narrow the range of the distribution of achievement you would have to have some kind of pedagogy which is selective with respect to the population that works with some but not with others, and I realize there are a variety of things on the horizon that would appear to have that feature.

QUESTION: One of the things about money damages is that it's meant as a compensation and it gives you something that you can do with as you want. That means that the people who get money damages, if they have them, can go on the outside and either take them to try to get this learning or to use it for other things that satisfy them.

One of the things you might promote by this kind of framework of looking at problems would be to have more learning on the outside. It seems to me that looking at the problem that way suggests that what really these kinds of plaintiffs are looking for is a bigger share of adult goodies. They want to get more from the society in their adult lives, and what we're really talking about is trying to get some redistribution of income, either in cash or other kinds of adult benefits. It seems to me that people who come out at the bottom are saying, "We don't like that." I think that if Paul's state of events occurred in the system that was able to match the bottom quartile with the bottom quartile of jobs, people would still be here complaining that that is not sufficient for us, "We want higher wages for our jobs and more taxation of the people at the top."

I think really this kind of case should be viewed as part of this kind of income redistribution effort.

MR. GREEN: It might well be. I don't dispute your judgment about the outcome. I began by saying I believe the world is pretty intractible and complicated and unfair and unjust and, to a lot of people, cruel. I want to, however, emphasize one thing

that Susanne said in her discussion this morning that really impressed me. That is, quite apart from this argument or the argument as to the efficacy of education for effecting any kind of redistribution of income or any of these other issues, to have no recourse against the kind of behavior of persons within a bureaucracy she's talking about seems to me a serious, serious deficiency and a serious difficulty in the system of justice.

I'm not really commenting on your point. I'm just trying to suggest that there's another aspect of the case. It could be viewed as a portion, as a step, as a contribution, in the effort to redefine the language, the concepts that we use in talking about educational goods. It could be viewed as a part of a social movement looking toward certain effects on redistribution of income. It can also be viewed in another light, it seems to me, as a case that drives home to us the problem of having no redress against incompetence, stupidity, sheer laziness, and a variety of other things. So I think there are a lot of ways of dealing with it.

QUESTION: I think you're right and I think it's very useful for you to point out that there are two kinds of objectives that people might have in pursuing these actions; the output objectives and the elimination of unfairness objectives. It's confused because they are put together in the same suit, or the way the people are measuring whether they occur or not seem to be by the same kind of standard.

I think it's very helpful to, as you have, try to separate these as different kinds of things, and you might well find much more present-day judicial acceptance of this kind of effort if it's directed at the point you're talking about more clearly, because that's rather more conventional thing. The courts know how to deal with administratively arbitrariness.

MR. GREEN: Yes. That's very helpful.

QUESTION: I personally think that we probably have 25 to 50 percent--we could reduce the cost of education by that much and get what we're getting if we didn't require excessive credentialing, pupils to finish and so on.

I was going to ask, do you think it would be feasible to try paying pupils to finish school earlier?

MR. GREEN: Feasible to try what?

QUESTION: Paying pupils to finish school earlier.

MR. GREEN: I don't think you have to. You look at the average daily attendance rates at least in the schools in New York--I don't know about New York City because the average daily attendance levels aren't very high, but in the best academic high schools as well as the most difficult ones in Central New York, the absentee rate is enormous at the 12th grade. As a matter of fact, I think as a matter of observation, what the social process is that we're undergoing right now--I think grades 11 and 12 are becoming inactive. People are leaving them. They're not around.

QUESTION: I agree. I have an example because some of my family is now in the New York City schools, and the absenteeism is fantastic. But that's still not responsive to my question. If we were to say to the student in the 9th grade, "If it takes you four years it's going to cost us so much. If you do this in two years, we will set up some kind of standard and you will get so much that goes into your college kitty or whatever kitty you're going to do later and so much will go to the teachers and so much will go back to the schools."

MR. GREEN: I think that'a a terrific idea. There's another option that I propose, one of the things that Stuart explored at an earlier time, and that was the development of a legally defensible claim upon the society after the fashion of social

security for certain number of years of education and public expense without regard for the sequence in which it's taken. So it would be quite conceivable that many people might get four or five or six years of college at public expense, having left high school early and done something else and come back at a higher level. My own judgment is that that could be financed almost out of the Social Security account by regarding it, indeed, as insurance against which you can borrow against future earnings which would repay your account in social security.

So there's a lot of techniques for trying to bust the sequence of that system. I think that when that's done the educational opportunities for Peter Doe will be improved. I'm not sure that his performance will be improved by that.

QUESTION: Can I pursue just one more step. I think, to some extent, the public schools suffer from advice from professors who don't apply it in their own institutions, even though it is perfectly appropriate. It seems to me this is one area where it is perfectly appropriate, where you can say it costs us so much public money to put a student through college and we can say, "If you do it in two years instead of four, we'll give you some of the savings from what it would have cost us if you had taken four years."

On excessive credentialing we have the same kind of problem. In the City of New York where we have an enormous number of kids coming in and in their second and third year of college and they can't read or write any better than this other kid graduating from the San Francisco schools.

So you see any of these things as being applied to college before K-12 to increase their credibility at the K-12 level?

VOICE: There was a lawsuit where a couple of students sued Columbia on the grounds there was a sentence in the catalog that said that the trustees shall provide to this university wisdom and knowledge, and these students said that "We took courses but we got no wisdom and knowledge." And the guy argued this in court. He agreed the guy didn't have any wisdom or knowledge, but he did not choose to blame the board of trustees for it.

QUESTION: Are we going to go back and advise the students at our institutions to sue the place if they don't learn, or is that something we just advise public school students to do?

MR. GREEN: I wouldn't advise either one to do it. I find myself in a very mixed position with respect to Susanne's case. It seems to me the value of this is that it really forces you to examine, as a case always does in a concrete setting, exactly what the intricate logical social reasoning is, and in that process it helps us to reformulate the ways in which we use language to describe benefits, rights, powers, duties, etc.

PRESENTATION BY HARRY HOGAN, DIRECTOR OF GOVERNMENT RELATIONS, CATHOLIC UNIVERSITY: "POLITICAL AND LEGISLATIVE PERSPECTIVES ON THE EMERGING ACTION."

MR. HOGAN: It's late in the day so I'll try to be brief.

Essentially, what we have addressed today is the problem of change. How do we accomplish it in an era in which there's general dissatisfaction with education. Despite the kind of progress generally that Tom Green has described, there is a great deal of dissatisfaction. It's deep and it's widespread and it's expressed in this lawsuit.

If we're going to accomplish change in our society, we have two main routes available to us. One is administrative and the other is judicial. Increasingly, since World War II, the courts have undertaken a responsibility for making board social changes. There are advantages and disadvantages with either route.

We have heard the presentation by Susanne Martinez on her complaint to the Court for a judicial remedy. We had a presentation by Fred McDonald on a program for accomplishing change administratively in the City of New York. The two provide an interesting contrast--very much so.

If the general problem before us is how to accomplish change, the specific problem is how to impose a responsibility upon an educational system for producing or accomplishing a minimum level of reading skill. That's really the precise, simple problem that Susanne's complaint is addressed to.

If you attempt to solve that kind of problem administratively, in the manner described by Fred McDonald, you are using a pretty sophisticated, tentative, difficult to follow, cautious way of handling the facts. It is based on a great respect for the ultimately obdurate nature of reality and for the difficulties in

our understanding it. For example, he is suspicious of the accuracy and usability of literacy tests. He is hopeful that better tests can be developed, but is critical generally of the tests that are now available across the country.

Fred suggests an administrative procedure by which the institution itself would develop self-imposed standards. Teachers, the schools, districts, boards of trustees, each one would undertake a role of responsibility in a process for developing working goals for themselves. They would not be accepting an outside standard imposed on them under any system of philosophy which had absolute values.

In that administrative system of handling change, there's an inevitable ambiguity regarding responsibility. An outsider or a third party or a beneficiary who thinks himself abused has really great difficulty in identifying the precise person to hold responsible, i.e., in legal terms the defendant he wants to move against.

So what you have in that administrative process is a recognition of difficulties in manipulating the real world and the creation of a process to meet those difficulties which distributes responsibility generally, and which tries to create a consensus moving everyone cautiously toward agreed-upon goals.

Now, what we have in the judicial process is a different kind of an instrument entirely. It disregards consensus, and tries to focus responsibility on particular defendants as individuals or categories. There are two kinds of approaches to the problem legally. One is to impose a kind of absolute responsibility for the product if you want to call it that. Generally you would look, for the authority for the imposition of that responsibility, to the Federal Constitution, its due process clauses and the equal opportunity clause, or to the state constitution and analogies to those clauses that might appear in it.

This kind of judicial constitutional approach, has been used and been successful in various relatively simple situations. It's given us equal access to schools through the desegregation decisions, and tracking decisions, and it's been used to require equal expenditure per capita in school systems. For simple goals like that, this technique is useable. Where used, it compels absolute, uncompromising change, or change as nearly absolute as is possible to mortal man.

In addition to the constitutional grounds, there are other grounds which support a lawsuit in the more traditional sense of providing remedies for the individual plaintiff. These other grounds which impose a duty on defendants can be found in common law, in the statutes and in regulations. In this instance, Susanne's complaint is based on this second category of declared duties, essentially common law and statute, rather than on a constitutional argument.

The difficulty in effecting change in a non-constitutional fashion is, that, even if the lawsuit is won, it's possible for the defendant to meet the necessity of court-ordered change with relatively minor changes in administrative practices. What you accomplish if you win is that the lawyers for the school districts make some changes which leave the system essentially as it is but create the legal defenses which make it possible to defend the next lawsuit.

If you're going to use the judicial technique to accomplish the change, you've got a number of kinds of lawsuits that are possible, a number of weapons in the legal armory. A suit for negligence, which is essentially what Susanne's complaint is--that suit can either state a general duty and failure to perform, or specific duty and failure to perform.

A good deal of the questioning addressed to Susanne this morning was an effort to uncover specific responsibilities, specific duties,

specific failures to perform. Specificity in the complaint, of course, imposes a burden of proof on the plaintiff, and indicates the kind of defense that the Defendant must offer.

There are other lawsuit possibilities which we didn't describe in this morning's colloquy. They include a suit for a judgment declaratory of the law, possibly coupled with a request for specific performance. They include also the possibility of a suit in implied contract. Specific performance is I think of interest in terms of the questions addressed to Tom Green. For example, it might accomplish the imposition of a responsibility on the school district to provide or pay for the remedial reading costs that would otherwise have to be incurred by the plaintiff.

As Judge Freedman described it, there are a number of defenses which affect the tactical decision on how you want to proceed. You will recall that Fred McDonald described, from a non-lawyer's point of view, what seemed to him the great difficulties in establishing causal relationships. Essentially, the law, expressing the belief of our Western civilization in rationality, is an effort to order society by establishing causal relationships. The kind of concern that Fred expressed philosophically is expressed technically in the law by requirements of proof, and the recognition of defenses such as those which the judge described.

So defenses would be: first that there is no duty expressed in the law or statute; secondly, that even if there is a duty, there's no evidence that would support a conclusion that the plaintiff's condition is the result of anything that the defendants did or did not do.

You will notice here that you come up immediately against the possibility that there's an absolute liability on the part of the defendant in the sense that if you allege that this plaintiff is not able to read; and if the defendant has an absolute liability

to have prepared him to read, then you have carried the plaintiff's burden of proof. However, I would be inclined to agree with Judge Freedman that a court would be most reluctant to accept an absolute liability theory.

In the absence of absolute liability, the plaintiff will face a difficult problem of proving causal relationship. A special form of defense in law is termed "contributory negligence." I think it is bound to give Susanne all kinds of trouble in this case. What she will have to do really is defend this plaintiff's life, his parents, his home situation, and everything about him against the attack that somehow or other he, himself, or other parties are responsible for the condition he finds himself in.

The allegations of school misrepresentation to the parents about the boy's ability to read, I think, would be difficult to handle. Judge Freedman didn't address himself to them particularly, but the parents here had to be pretty much aware that the boy had a problem. A misrepresentation that contradicts known facts does not carry much weight. To be legally meaningful, the misrepresentation must be shown to have caused a change of position of the plaintiff to his damage. If the parents, although aware of the problem did nothing, then they face a laches defense. They had a duty to act. Susanne will have to meet that kind of attack.

Independently of the apparent lack of any statutory basis for stating a cause of action, that is, a duty and a failure to meet it, we are forced by the causal problem back to the position which Judge Freedman found so difficult to maintain; and that is, absolute liability. In other words, we come to the conclusion that the case, if it rests on the statutes or on the regulations, encounters causal problems which are almost impossible to meet; and then, of course, we are back on an absolute liability position based on a constitutional interpretation of the due process or equal opportunity clauses.

Judge Freedman also had difficulty with the damages problem inherent in a negligence action. In this case, the plaintiff is asking for a million dollars in damages and that presents almost an impossible problem for any judge. The theory that the imposition of damages is a socially effective way to accomplish change is based upon what in criminal law is called "deterrent efficacy." That is, if this defendant has to suffer through the payment of a damage penalty for failure to teach this plaintiff to read, other prospective defendants will be deterred so that they will exert themselves to teach all students to read.

The difficulty here, of course, is that you might just have the opposite result. If this plaintiff here makes anything like a million dollars through his inability to read, then refusal to learn to read would be a short route to financial success for most anybody. Therefore, you come out with a socially undesirable result in terms of what you want to accomplish.

Regardless of that kind of consideration, what you would certainly have is the imposition of tremendous costs on the educational system, which inevitably would involve the diversion of money from educational goals to the satisfaction of damage claims for a particular individual.

There are other difficulties with giving control of the change process to the judiciary. For one thing, you have an adversary proceeding with only a limited number of parties involved in which you're going to attempt to obtain a radical change in the way society is handling a problem. This contrasts with the legislative technique of extended hearings open to the public where everybody can appear and make an argument; in turn the legislative process is part of the larger political process, with elections, campaigns and the general public colloquy.

The colloquy possible in the judicial arena is much, much more limited. It is conceivable, of course, that the judge may have

wisdom superior to the rest of us, but even so he runs the danger of imposing what may be only the transient wisdom of the moment upon society in a peculiarly rigid form, particularly if he bases his decision upon constitutional grounds rather than the statutory ones. That kind of rigidity can be reflected first in problems that have to do with acceptance now by the judge of standards of performance which may be totally unacceptable five to ten years from now; and, secondly, in the imposition by him on the system of costs which would then have to be met by the school districts either in reallocation of resources within the educational arena by diversion of money from other costs, such as salaries, or guidance counselors or whatever, to the meeting of this kind of a priority, or in the acceptance of additional educational costs. Such a decision is really a reallocation of resources from other social needs.

In other words, you will have a kind of arbitrary, one-sided intervention by wise men perhaps, if judges are such, into a very difficult priority allocation process which traditionally our society has left to legislatures. That tradition was expressed by our ancestors at the time of the Revolution in the words "No taxation without representation."

There are possibilities of other suits against other defendants which I will mention briefly. Somebody mentioned suing parents. To sue parents would be to move against the trend, which by and large is to transfer responsibility from parents to states, but certainly parents have always had a responsibility for the education of their children. In modern times, that responsibility tends to deteriorate into one of a responsibility for bare attendance of children at school.

In common law, parents have a responsibility to provide necessaries to their dependents. Necessaries include food, clothing and shelter, and possibly the provision of education. The issue has come up in divorce suits particularly--dependent children at the

age of majority whether it is 18 or 21 can remain a responsibility of the divorced father for support for higher education. The courts will recognize that kind of responsibility. If so, then conceivably the plaintiff here might have a right of action against his parents.

There are effectively, then, two kinds of possibilities in terms of social techniques for accomplishing change. The kind of approach that Fred McDonald described, the administrative, which if you were to use words which would describe it, you'd say was tentative, constantly under judgment, probing, with no final conclusions, with a distribution of responsibility, very much concerned with process, very unsure regarding standards or goals, where you set tentative goals but reconsider them and reset them. Judge Freedman's analysis of the limitations of the judicial process indicated concern for the kind of reasoning process that makes that cautious, flexible administrative decision-making attractive.

Judge Freedman talked about our system of separation of powers. Our whole system is based on a belief that it's very difficult for mortal men to be sure of the truth--men are fallible and they make mistakes and they are prone to err--we all live, in the old religious sense, under original sin. The idea being that if absolute knowledge is not available to us, then what we have to live with is the necessity of using the best information we have and changing our decisions as more information comes in. It's on that kind of empiric nominalistic epistemology, that the Founding Fathers constructed the political system set forth in our Constitution. Judge Freedman and Fred McDonald are agreed on its high value. It contradicts the kind of reasoning process that you have to demand of a judge in this situation. Such a demand asks a judge to assume the burden of responsibility for wisdom beyond his ability to assess present information or to predict future information.

Nevertheless, to return to what Susanne told us initially, what Susanne is asking for here is essentially a very limited

thing, that this school district accept responsibility for giving this young man an ability to read at a minimum level.

I think what will probably happen over the next few years is the courts around the land will face this same problem. Some will reject it and some will accept it, perhaps in tentative fashion. They will be testing and probing to see whether it fits in the same category as equal access, equal per capita distribution of money, the kind of thing which the Supreme Court and the judicial system has carried us into since World War II.

There's probably a little less enthusiasm now, in the first third of the '70's, about judicial assumption of that kind of responsibility than there was in the period immediately after World War II. So it's probable that if this responsibility is accepted by the courts it will be done in much less absolute fashion. Probably it will be cut back, related not to a constitutional provision, but more probably based upon statutory interpretation.

In summary, if you go the statutory route, not only do you face the problems of establishing legal duty, failure to meet that duty, and including causal relationships, meeting the defense of contributory negligence which are very, very tough, but you also give the school district the chance to avoid the duty that the judge points out, because it's then possible for the legislature and the school district to change their standards to accommodate to the decision.

If you go the constitutional route, no flexibility is possible. What you receive from the judge then comes down as from Delphi or from the Papal curia. It's inflexible and total.

So in conclusion, what I'd say is that the judicial technique offers some possibility for change but that it's an extremely difficult one to handle. There are lots of dangers associated with

it, as illustrated by our current experience with the courts in regard to desegregation.

DISCUSSION

QUESTION: I'd just like to point out one of the things we were talking about last night. There is a possibility of an amalgamation of the two approaches. That is, the suit on behalf of the individual on the one side, and the kind of voluntary administrative change on the other, which is a suit on behalf of a class of kids in any given system which class is not learning to the minimal level, and then to try to establish that. Whether or not there are remedies for any particular child, there are institutional structural remedies that may be available for the bulk, if not every member of the class; and that what the system is doing now is not working and that there, a court could conceivably go the next step of ordering the system to experiment with one of several other models which we do present evidence on and have a reasonably good likelihood of success for a large group of people.

That's something we talked about at some depth last night and something I'm particularly interested in.

MR. HOGAN: A suit such as Gary suggests would be a class action asking for a declaratory judgment, and probably for specific performance by the school district in providing some service, and it has great tactical advantages.

For one thing, it dissipates, diffuses, mitigates the problems that the plaintiffs' attorney will face in regard to contributory negligence because you don't have to expose one plaintiff to a constant attack on his whole background. You've got a class of people who have common characteristics and you can defend those characteristics as being logical, but you don't face that contributory negligence problem.

Secondly, you don't confront the judge with the money problem that a damages suit imposes on him. If you don't have the money problem, what you're really asking him to do is to pinpoint and and recognize a precise wrong and to confine his remedy to that

precise wrong, which simplifies the plaintiff's problem, it seems to me, tremendous in terms of what he can hope to persuade the judge to do.

QUESTION: I just want to make one other comment on the contributory negligence. I think there's a very interesting issue there. An awful lot turns on how you formulate the burden. I would concede perhaps on behalf of the individual plaintiff, if I had to, that his home environment, for example, may not have been ideal for his learning or his parental situation may not have been ideal for his learning or his neighborhood situation may not have been ideal for his learning. All of these things might have made it more difficult for this child to learn than for some other child. I would just concede that at the outset and I'd eliminate, in effect, contributory negligence.

But what I would turn around and say then, notwithstanding whatever debilities he brought into the system, I can prove to the court that if the system treated this kid or somebody else who was basically like him differently, with his native ability that we can demonstrate, he would, to a virtual certainty, have learned; and the converse of that, that the way they did treat him, in fact, was a very major factor in why the kid did not learn.

I think if you can show that with the individual or for the group, that even with the disabilities the kids can learn, then you kind of shift the burden over to the system, and it seems to me you may have anticipated and dealt with in advance the contributory negligence argument.

QUESTION: I'm puzzled at the way you defined the issue. It seems to me a school system might be more negligent because relatively bright kid is only performing at an average level than it might be if an average kid can't do as well. Beyond that, I have the feeling that the possibility, if this lawsuit were won, is that it might be a disaster for education. Maybe that's

desirable. I have a feeling that possibility hasn't been considered. Let me explain why.

If you take something like certain contagious diseases where there are certain technical bases known and through the political process we say we're going to wipe it out, and then if a kid gets a contagious disease because of the negligence of a public health officer, the basis for suit would seem to me to be quite clear. A person would have a rather definable claim and the obligation of the public agency and the technical basis for their doing it is pretty clear.

Now, if it comes to teaching reading and let's say it really isn't all that clear that the technical basis for making sure that a kid like this could read is established and the school system he's going to is going to be sued successfully because they don't do it, maybe the obvious response will be to say we won't accept that as a function because the technical basis for achieving it isn't as clear as in the case of getting rid of a contagious disease.

I would guess that being subject to penalty for not being able to do something where you weren't clear about the technical basis would lead to a rapid divestiture of that as an objective; that is, the teaching of reading.

MR. HOGAN: I think that's right, and that's what I meant when I said if the lawsuit is based on statute and regulation, then we'll get changes in those in order to accommodate reality. If it's based on the constitutional provision, we don't have that escape available; and when you run into the major problems there is at least the possibility we'll be sorry we ever brought it up.

QUESTION: It strikes me, given that example, that that might be avoiding change rather than accommodating to it. I think it will be exactly what happened in California, maybe for different reasons. Political pressure builds up to limit the burden of the public role

because they are not sure they can accommodate to the new demand. I'm not sure that's an affirmative change. If it's a change, it may be a negative change. We're not sure we can do it; therefore, we are not going to try it at all.

MR. HOGAN: Change is not an end in itself. It's got to be related to capabilities. I think that's what you're saying.

QUESTION: I'd like to return to the class action. It seems to me, even though it might have the effect as has been pointed out of easing the problems or simplifying the litigation strategy, it raises a whole new problem of remedy which might be just as difficult as the money damage remedy that's envisioned in this suit. As I understand the idea, the court will decide the methods through which the school will instruct pupils so that the defidiencies in learning will not occur, which it seems to me that you're going to be getting judges on ground that they will be just as unlikely to want to tread as taking the possibility of perhaps bankrupting school districts through awarding money damages.

MR. HOGAN: Well, you're right in the sense that the plaintiff attorney in this kind of a suit has really a major problem in enticing the judge to accept that kind of responsibility. It's a very great problem, a problem which Judge Freedman would say he would find some reason to decline if he possibly could.

The class action thing, to the extent that it sharpens up the characteristics of the deprived group, may limit that problem to the judge more than if you present it to him in terms of the difficulty a particular plaintiff faces. Maybe not. It depends upon the facts.

QUESTION: I think in passing the ESEA Title I, you had there a class legislative proposal which might have dealt with this, except that in its implementation it caused a debilitation in

terms of reaching a solution by the question of concentration and all these things, while even the initial report said that while you may consider change of the system--the implementation or administration of the system, you may not change the system. You must target. You must go in. So I think there was legislation but it was debilitating legislation with regard to the solution. The problem of administration of the law by ESEA Title I is a different kind of animal than the problem of administration of a court decree. The court sits there week in and week out and it gets all sorts of trials. In the administrative process of this distribution of money under ESEA Title I, you had the treatment by schools all over the country of the money as essentially a kind of general aid, but not specific categorical aid.

QUESTION: It seems to me the class action, and especially if you're talking in terms of declaratory judgment and specific performance, may offer a possible solution in a way that the greatest amount of introspection and analysis of the educational process never can.

For instance, if we look at the case of the Philadelphia complaint as well as most of the children who are academically retarded in the schools, you find a common pattern of social promotion. Just this one example. The calculated disregard of educators for the problem of social promotion, however, creates an educational problem because of the systemic nature, so that there is no accountability and the fifth grade teacher who received John Doe, who hasn't learned his alphabet but who has been promoted to the fifth grade, is incapable of dealing with them and has the ready-made excuse of very limited control in terms of specific performance of possibly saying to the system not to promote children until they have achieved.

So that you intervene within the system itself and attack many problems at their roots. The disregard of the problem that's

available to us as long as we don't have the element of compulsion, actually creates many of the problems in a geometric sort of fashion in terms of accountability at least.

MR. HOGAN: Well, society has used the schools not only to teach but also to certify. Now, the value of having a high school education, to some extent, is dissipated because everybody goes through it and because they go through it they have got a kind of a semblance of certification, which is separated out from the judgment or the ability to do the job, the kind of thing you're talking about; and it may be that lawsuits will play a role in the public colloquy, the public debate on the nature of education, to sharpen it up.

QUESTION: Well, I have a feeling that the lawsuit is, in a sense, counterproductive. I thought lawsuits might be a fruitful way of getting action, but not this way. For example, let's say I have a child who comes home every day with homework and information about a particular class or teacher that obviously can't be justified under any known educational basis I have ever heard of. So I might start a lawsuit with regard to a particular subject on a much more limited basis, not waiting 12 or 13 years to do something. But here, you've got the concrete evidence that in this course in biology that she's taking this is what she's getting in class and so on and so forth.

It seems to me that lawsuits might have some role in dealing with a more limited and definable and clearcut factual basis of teacher behavior for malpractice, but letting it go the lengths of this lawsuit, it just didn't seem to me, in listening today, that it was ever going to make the grade.

MR. HOGAN: Any other comments?

QUESTION: I thought your comment, Mike, before was a very challenging idea, about the public health official. In fact, I think it may be fruitful to think about that. Suppose this were a meeting of lawyers and health officials and Susanne was up here complaining about Peter Doe who has TB, and even though we know that the health system ought to be able to eliminate TB in this country, there still are large segments of minority poor people who have TB in this country. They are mad about that and they would like to be cured.

I'm sure that the health officials would tell us that there are conditions out there in the neighborhoods or there are technological problems that make it impossible for us. Even though we describe this general ability to get rid of TB in the country, we can't get rid of it for everybody.

Then, I think we ought to think about how do you feel about that. Should there be a system that nevertheless gives people a right to go into hospitals or something when they get TB independently of anybody's fault, if society has taken on this job of trying to get rid of TB? You might come back and say, "Yes, I like that idea. We should have national health insurance to take care of these people, but that's different from teaching reading."

I guess I feel that I'm pretty disappointed about the schools' ability to justify their whole existence. They are not willing to say, "We take on the obligation of teaching reading. I think that's why the suit gets stuck in asking for minimums and that's why it isn't capable in its present development to deal with the kid who ought to be achieving terrifically, and I think that's a whole different problem we haven't addressed at all. But I think this is the kind of thing we ought to be asking about it.

QUESTION: Could I just add something to that in the same line. We have been assuming--and I believe it's supportable by educational

psychology--that part of the key to getting kids to learn is the level of expectation. It seems to me the same thing is translatable to the school system as a whole. Obviously, we don't want to assign an impossible task that we know we could never realize. On the other hand, it seems to me, to get it to perform better you have to expect it to do more than everybody would agree it can and is doing. It seems to me, again, we have to expect, within reason, more than it is now accomplishing, perhaps more than it now has the knowledge and resources to accomplish in order for it to get those resources and to acquire that knowledge. That lops off areas of impossibility which we're all worried about, but not areas of possibility.

QUESTION: I'm told there was an ancient society where the doctors were punished if the patients died, the upshot being that they stayed away from all the dangerous patients.

Editor's note: With that rhetorical question, the conference ended.

APPENDIX

School District Sued

He Was Graduated, But Cannot Read

SAN FRANCISCO — (UPI) — A teenager who graduated from high school without learning how to read adequately or write has filed a $1-million suit against city and state for defrauding him of a proper education.

The suit, filed against the San Francisco School District and California education officials, said the 18-year-old went to schools in the city for 12 years and graduated from Galileo High School.

It charged that his mother was repeatedly assured that he was learning at his grade level and needed no remedial or special training. But when he graduated, the suit said, he was only able to read at fifth-grade level.

The youngster, identified only as Peter W. Doe to protect him "from public stigma and humiliation," was described by attorney Susanne Martinez as a student who attended classes, had no disciplinary problems and has shown since graduation that he can be educated.

Yet he graduated "unqualified for employment other than the most demeaning, unskilled, low paid manual work" after being deprived "of what is unquestionably one of the most fundamental necessities in this technological society — the ability to read," said Miss Martinez of the Youth Law Center.

The suit seeks $500,000 general damages, $500,000 punitive damages, and the costs of tutoring which has recently increased the teenager's ability to read.

January 31, 1973

Dear

You are cordially invited to participate in a daylong briefing conference. The conference is being held to sharpen federal, state and local understanding of the potentially revolutionary implications of this suit for the current movement to satisfy accountability demands across the nation.

You are invited because we believe you have a great deal to contribute and to gain from this session, and because we believe this suit is likely to have major impacts on public education. If you are unable to attend, we urge you to designate an alternate to attend in your place.

The enclosed announcement includes all the relevant details.

WE URGE YOU TO ACT IMMEDIATELY.

Sincerely,

Stuart A. Sandow
Associate Director

Co-sponsored by:

Educational Staff Seminar
Institute for Educational Leadership
The George Washington University
and
Lawyers Committee for Civil Rights Under Law
Washington, D.C.

SUMMARY

The following is a brief summary of the facts and legal contentions of Peter Doe v. San Francisco Unified School District.

On November 20, 1972, an action was filed in San Francisco Superior Court against the San Francisco Unified School District and various other defendants by an eighteen year old graduate of one of the public high schools operated by the school district. The complaint seeks in excess of one million dollars in damages. The facts are as follows:

THE PARTIES

The plaintiff. The plaintiff is an eighteen year old male. His I.Q. as determined by the San Francisco School District is of normal ability. During the course of his thirteen years in the San Francisco public schools, he maintained average grades, never encountered any serious disciplinary problems and maintained regular attendance. He advanced year by year through the public school system until he was eventually awarded a high school diploma. At various points throughout his school career his parents expressed concern over his apparent difficulty in reading. They were repeatedly assured that he was reading at the average level and had no special or unusual problems.

Shortly after high school graduation, plaintiff was examined by two private reading specialists. Both specialists indicated that the plaintiff was reading at approximately the fifth grade level. Since these tests, the plaintiff has engaged in private reading tutoring and has made significant progress in improving his reading level.

The defendants. The defendants are the San Francisco Unified School District, its Board of Education and Superintendent of Schools, the State Department of Education, its Board of Education, and the State Superintendent of Public Instruction. The complaint also names one hundred DOE defendants alleged to be the agents or employees of the public agencies.

THE CLAIM

The complaint contends that the plaintiff has been deprived of an education in the basic skills of reading and writing as a result of the acts and omissions of the defendants. It consists of nine separate and distinct legal grounds for the school district's liability. These nine causes of action break down, with some overlapping, into four general areas: negligence,

misrepresentation, breach of statutory duties, and constitutional deprivation of right to education. The specific claims are as follows:

First Cause of Action (general negligence). The first cause of action contends that the defendants, their agents and employees, should be held liable to the plaintiff in that they negligently failed to provide the plaintiff with adequate instruction, guidance, counseling and/or supervision in basic academic skills and further that they negligently failed to ascertain accurate information as to plaintiff's educational progress and abilities.

Second Cause of Action (misrepresentation). The second cause of action contends that the defendants, their agents and employees, falsely represented to the plaintiff's parents that he was performing at or near grade level in reading and writing and was not in any need of special or remedial assistances whereas the plaintiff was, in fact, performing drastically below grade level and in great and severe need of special assistance.

Third Cause of Action (breach of statutory duty). The third cause of action contends that defendants, their agents and employees, violated relevant provisions of the California Education Code charging school authorities with the duty of keeping parents accurately advised as to the educational progress of their children, and that without such accurate information, plaintiff's parents were unable to take any action to protect their minor son from the harm suffered.

Fourth Cause of Action (breach of statutory duty). The fourth cause of action contends that the defendants, their agents and employees, violated relevant provisions of the California Constitution and Education Code charging defendants with the duty to educate plaintiff and other students with basic skills of reading and writing.

Fifth Cause of Action (breach of statutory duty). The fifth cause of action contends that the defendants, their agents and employees, violated relevant provisions of the California Education Code providing that no pupil shall receive a diploma of graduation from high school without meeting minimum standards of proficiency in basic academic skills.

Sixth Cause of Action (breach of statutory duty). The sixth cause of action contends that the defendants, their agents and employees, violated provisions of the California Education Code requiring inspection and revision of curriculum and operation of the schools to promote the education of pupils enrolled therein.

Seventh Cause of Action (breach of statutory duty). The seventh cause of action contends that the defendants, their agents and employees, violated relevant provisions of the California Education Code requiring school districts to design the course of instruction to meet the needs of the individual pupils.

Eighth Cause of Action (breach of statutory duty). The eighth cause of action contends that the State Board of Education their agents and employees, failed to properly discharge its statutory duties including promulgating minimum course of instruction to meet needs of pupils, minimum standards of proficiency for graduation from high school and administration and supervision of the educational system in California.

Ninth Cause of Action (constitutional duties). The ninth cause of action contends by the acts and omissions of the defendants, their agents and employees, the plaintiff has been deprived of an education, guaranteed by the United States Constitution, the laws and constitution of the State of California.

THE DAMAGES

The complaint contends that as a result of the acts and omissions of the defendants, the plaintiff has suffered a loss of earning capacity by his limited ability to read and write. It contends that the plaintiff is unqualified from any employment other than the most demeaning, unskilled, low paid, manual labor which requires little or no ability to read or write. It is further alleged that as a result of the acts and omissions of the defendants, the plaintiff has suffered mental distress, pain and suffering, and that said injuries and damage will result in his general damage in the sum of $500,000. The complaint asks that punitive damages of $500,000 be assessed against the defendants in addition to general damages and the costs of private reading tutoring and court costs.

FRAUD IN THE SCHOOLS: COURT CHALLENGE TO ACCOUNTABILITY

Friday, March 9, 1973

Mayflower Hotel
1127 Connecticut Ave., N.W.
Washington, D.C.

Co-Sponsored by:

Educational Policy Research Center
Syracuse University Research Corporation
1206 Harrison Street
Syracuse, New York 13210

(Stuart A. Sandow)

Educational Staff Seminar
Institute for Educational Leadership
The George Washington University
Suite 610, 2000 L Street, N.W.
Washington, D.C. 20036

(Samuel Halperin)

Lawyers Committee for Civil Rights
Under Law
The Woodward Building
733 15th N.W., Suite 520
Washington, D.C. 20005

(Steve Browning)

Speakers:

Haskell C. Freedman, Judge of
Probate Court
208 Cambridge Street
East Cambridge, Massachusetts 02141

Thomas F. Green, Director
Educational Policy Research Center
1206 Harrison Street
Syracuse, New York 13210

Harry Hogan, Director
Government Relations
Catholic University
620 Michigan Avenue, N.E.
Washington, D.C. 20017

Susanne Martinez, Attorney for the
Plaintiff
Youth Law Center
795 Turk
San Francisco, California 94102

Frederick McDonald, Director
Division of Educational Studies
Educational Testing Service
Princeton, New Jersey 08540

PARTICIPANTS

Ronald Anson, Legal Research Team
National Institute of Education
Code 600
Reporters Building
Washington, D.C. 20202

Albert Berrian
Associate Commissioner for
Higher Education
New York State Department
of Education
Albany, New York 12224

Theodore L. Birdsall, Jr., Director
Office of Educational Standards
South Dakota State Department of
Public Instruction
Pierre, South Dakota 57501

(For: Don Barnhart, State Supt.)

Edward Bispo
Deputy Director
National Right to Read
400 Maryland Ave., S.W.
Washington, D.C.

Charles L. Blaschke, President
Educational Turnkey Systems, Inc.
1660 L Street, N.W.
Suite 1211
Washington, D.C. 20036

Edward Bowling, Director
School Board Academy
National School Board Association
800 State National Bank Plaza
Evanston, Illinois 60201

G. Holms Braddock, Chairman
Dade County Public School Board
1410 N.W. 2nd Avenue
Miami, Florida 33132

Leonard Britton
Assistant Superintendent for
Instruction
Dade County Public Schools
1410 N.W. 2nd Avenue
Miami, Florida 33132

Cindy Brown
Washington Research Project
1763 R Street, N.W.
Washington, D.C. 20009

Jonathon Brown
Educational Staff Seminar
2000 L Street, N.W.
Suite 610
Washington, D.C. 20036

Richard Brickwedde
300 Wilson Building
Syracuse, New York 13202

Charles Bunting, Special Assistant
to the Deputy
Assistant Secretary for Education
Rm. 3153 FOB 6
U.S. Office of Education
Washington, D.C. 20202

(For: Peter Muirhead)

Reuben Burton
Deputy Director
National Right to Read
400 Maryland Ave., S.W.
Washington, D.C.

Theodora Carlson
c/o Assistant Secretary for
Education/Policy Commission
Room 3017
400 Maryland Ave., S.W.
Washington, D.C. 20202

Harry Chernock
Assistant General Counsel for Education
Room 4091 FOB 6
United States Department of Education
Washington, D.C. 20202

Miriam Clasby, Senior Research Fellow
Educational Policy Research Center
1206 Harrison Street
Syracuse, New York 13210

William H. Cochran
Assistant Superintendent for
Administration & Finance
Virginia State Board of Education
P.O. Box 6Q
Richmond, Virginia 23216

H. T. Conner
State Department of Public Instruction
Raleigh, North Carolina 27611

Fred H. Coombs, Jr.
Assistant Commissioner of Education
New Jersey Department of Education
225 W. State Street
Trenton, New Jersey 08625

Daniel Davis
Education Program Specialist
Division of Compensatory Education
Room 3642-A ROB 3
U.S. Office of Education
Washington, D.C. 20202

Don Davies
Center for the Study of Education
70 Sachem Street
New Haven, Connecticut 06520

Stanley Elam, Editor
Phi Delta Kappan
8th and Union
Bloomington, Indiana 47401

David Fendrick
3187 A Bellevue Ave., Apt. 7
Syracuse, New York 13219

Harry M. Gardner
Assistant Deputy Associate Commissioner
Bureau of Elementary and Secondary Education
U.S. Office of Education
Washington, D.C. 20202

(For: Robert Wheeler)

Edward Glassman, Program Analyst
Office of Planning, Budgeting and Evaluation
Room 4079 FOB 6
U.S. Office of Education
Washington, D.C. 20202

(For: John Evans, Asst. Commissioner)

Kenneth Hecht
Youth Law Center
795 Turk Street
San Francisco, California 94102

Kent Jonas
Special Assistant to Assistant Commissioner for Legislation
U.S. Office of Education
Washington, D.C. 20202

James A. Kelly, Program Officer
Division of Education and Research
The Ford Foundation
320 E. 43rd Street
New York, New York 10017

Myron Lieberman, Director
Teacher Leadership Program
City University of New York
1411 Broadway
New York, New York 10018

James Lyons, Equal Opportunity Specialist
U.S. Commission on Civil Rights
1121 Vermont Avenue - 4th Floor
Washington, D.C. 20425

P. Alistair MacKinnon
Office of the Commissioner of Education
New York State Education Department
Albany, New York 12224

Margie Marshall, Editorial Board
Harvard Educational Review
Appian Way
Cambridge, Massachusetts 02138

Robert Mnookin, Director
Children and Government Project
Boalt Hall
University of California at Berkeley
Berkeley, California 94720

Charlotte Nusberg, Education Analyst
Stanford Research Institute
1611 N. Kent Street
Roselyn Plaza
Arlington, Virginia 22209

(For: Charles Williams)

Gary Ratner
Boston Legal Assistance Project
84 State Street
Boston, Massachusetts 02109

William R. Raymond, Ed.D.
Director of Planning and Evaluation
Department of Education
1535 West Jefferson
Phoenix, Arizona 85007

George B. Redfern, Associate Secretary
American Association of School Administrators
1801 N. Morre Street
Arlington, Virginia 22209

(For: Paul Salmon, Exec. Secretary)

William Riggan, Associate Director
National Institute of Education
Code 600
Washington, D.C. 20202

(For: Emerson Elliott, Acting Deputy Director)

Peter D. Roos, Staff Attorney
Center for Law and Education
61 Kirkland Street
Cambridge, Massachusetts 02138

(For: Miriam W. Edelman, Director)

Ann Rosewater
Washington Research Project
1763 R Street, N.W.
Washington, D.C. 20009

David Rubin
Office of the General Counsel
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

F. Brent Sandidge
Director of Division of Special Services
Virginia State Department of Education
Richmond, Virginia 23219

Gary Saretsky
Phi Delta Kappan International
8th and Union Streets
Bloomington, Indiana 47401

Pauline Schneider
MARC Corporation
733 15th Street
Washington, D.C.

Frieda Shapiro, Asst. Director
National Education Association
Research Division
1201 16th Street, N.W.
Washington, D.C. 20036

Larry Simon, Professor
Yale Law School
New Haven, Connecticut 06520

Bill Smith
Washington Research Project
1763 R Street, N.W.
Washington, D.C. 20009

Lyle Spencer, Jr., Director
Research & Planning for Allied Services
Office of the Assistant Secretary
Department of Health, Education and Welfare
Room 5044N
Washington, D.C. 20201

Gus Steinhilber
National School Board Association
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Stephen Sugarman
University of California
School of Law
Berkeley, California 94720

Roger Tilles, Director
Office of School Law and Legislation
State Department of Education
Lansing, Michigan 48933

(For: John Porter, State. Supt.)

Paul Tractenberg
Rutgers School of Law
180 University Avenue
Newark, New Jersey 07102

William Walters
Columbia University School
of Law
Broadway and West 116th
New York, New York

Martha L. Ware
National Education Association
Assistant Manager Teacher Rights
Washington, D.C.

Robert E. Weber, Associate Planner
State Education Planning
Department of Education
225 West State Street
Trenton, New Jersey 08625

Maureen Webster, Associated Research
Fellow
Educational Policy Research Center
1206 Harrison Street
Syracuse, New York 13210

Robert Wolf
Center for Instructional Research
and Curriculum Evaluation
University of Illinois
Urbana, Illinois 61801

Emerging Education Policy Issues In Law

FRAUD

number one of a series

by

stuart a. sandow

research fellow

an exploratory report from the

educational policy research center at syracuse

syracuse university research corporation

November 1970

FUTURE NEWS EVENT

LAFAYETTE SCHOOL BOARD GUILTY OF FRAUD

The Supreme Court today refused to hear an appeal from the Third Circuit Court in the case of John Brockman vs. The LaFayette Board of Education.

The case concerned the fact that while Brockman, 19, received a diploma from the LaFayette High School, he could only read at a seventh grade level.

His lawyers argued that the school system thus failed in its obligation to provide him with the learning skills they imply he received by awarding the diploma.

Judge Harold K. Smith commented, "This case could never have come to trial without the precedent set in the Marjorie Webster case of 1969, where the student was defined as a consumer for the first time. The implications for our system of education are profound."

The Appellate Court ruled in favor of Brockman over a year ago in a landmark case. The Brockman case is considered to be a direct result of the Webster case of 1969 where the Court ruled that it was valid to apply anti-trust laws to education. At that time, it was felt by many that a new era was dawning and that the implications of that decision would affect the course of education for many years to come.

Questions Addressed to Respondents

1. What is the earliest possible date by which this event could occur?

2. What is the most probable case advanced by the plaintiff?

3. What is the most probable defense the defendant would bring to bear?

4. From your knowledge base, what implications do you see this case having for the future of education in our country?

5. Could the effects of this case occur without this case or one of its genre going through the judicial process?

6. What types of legislative and judicial events would follow after the event and in what time frame on the Federal level?

7. If you see the event as beneficial to society, what lines of approach might disaffected groups of society pursue to help bring about the occurrence of the event sooner than you conjectured?
   If you see this type of case as threatening to society, what events might legislators/education officials bring to bear to forestall this case?

8. General comments: What other intriguing possibilities do you see as potential issues stemming from the Majorie Webster case?

MAJOR CONCLUSIONS

1. What is the earliest possible date by which event could occur?
   80% of respondents see the case arising and succeeding in 5 years.
2. Most probable case advanced by the plaintiff?
   Cause of action–negligence; implied contract
3. Defense?
   No contract; education not commerce; contributory negligence; assumption of risk; no guarantee; no warranty; common practice; "I can't think of one that will stand up."
4. Implications of case for the future of edcuation in U.S.?
   –Alternative private schools; performance criteria; fascism; community goal setting; taxpayers' suits; end of non-profit corruption to hide poor work.
5. Could the effects of this case occur without such a case going through the judicial process?
   –90% yes–through legislation.
6. What types of legislative and judicial events would follow?
   –Mandated quality of education; immunity from such suits; performance contracting; teacher organizations seeking immunity for members.
7. Is the event beneficial or threatening to society?
   –80% see as beneficial to society.
8. What other intriguing possibilities are seen?
   –85% see increase in the quality of education.

WHO PARTICIPATES:

For each issue addressed in this series, 200 individuals are invited to act as respondents. At least 90% of those men have been trained in law. While a significant percentage are private practicing attorneys, the others are:

Chief state school officers, legislators in state & federal offices, house counsel for major education corporation, Deans of law schools, counsel for relevant public and private agencies.

We have directed our attention to men trained in law because they are the very audience with resources to instigate action.

WHAT IS THE EDUCATIONAL POLICY RESEARCH CENTER AT SYRACUSE:

The EPRC was founded in 1967 with funds provided by the U.S. Office of Education on an annual basis. Its purpose is to define and assess alternative policies for education with an emphasis on the future consequences of present policy options. Three major research projects are post-secondary education alternatives, K-12 alternatives, and long-term policy planning. The Center was established in cooperation with the School of Education and the Maxwell Graduate School of Citizenship and Public Affairs of Syracuse University, and is administered by the Syracuse University Research Corporation. The Center consists of about twenty researchers, drawn from governmental and educational organizations, and from professors and graduate students at Syracuse University. Its focus on the future of education has required the Center to employ both traditional and new research tools, and to draw upon a wide range of experience and training in practical affairs and academic disciplines. The Center's emphasis on policy research has led to an expanding dialogue between its staff and the authorities and publics of education in order to relate its policy analysis to problems in educational policy formulation and planning.

WHY WE ARE ENGAGED IN THE SERIES

The Educational Policy Research Center at Syracuse has, in the past three years, developed material that helps clarify and place in perspective emerging issues that face the United States and are the concerns of this decade. The Center works to identify the dimensions of change in the many sectors of society and the impact of those changing realities on education.

This series attempts to translate Center research topics into specific legal issues that are worthy of exploration –issues that point up inequities in service or reveal policy alternatives.

One of the prime forces of social modification and change has been the effect of precedent case law. The events in this series act to focus attention on emerging issues and through them, deliver reasonable alternatives for policy at the federal level. Many of the issues in this series do not belong in the courts. They are the concerns of the legislature. But often, citizens demand action faster than can be met through the political arena. The cases and the analysis of them help speed the process of identification and hopefully redirect our federal policy agendas.

1

LAFAYETTE SCHOOL BOARD GUILTY OF FRAUD

The Supreme Court today refused to hear an appeal from the Third Circuit Court in the case of John Brockman vs. The LaFayette Board of Education.

The case concerned the fact that while Brockman, 19, received a diploma from the LaFayette High School, he could only read at a seventh grade level.

His lawyers argued that the school system thus failed in its obligation to provide him with the learning skills they imply he received by awarding the diploma.

November 1970

2

'OBSOLETED' EXPERT ELIGIBLE FOR SOCIAL SECURITY BENEFITS!
Appeal Filed!!

PHILADELPHIA (SURC) – The United States District Court in Philadelphia ruled today that John Aerosmith, an unemployed aerospace engineer, is eligible to receive advances, etc., from the social security trust fund.

Attorneys for the government have appealed to the United States Circuit Court of Appeals, and have indicated that, if the decision of the lower court is upheld, they will appeal to the Supreme Court . . .

April 1971

3

UNEQUAL STUDENT AID DECLARED UNCONSTITUTIONAL
Court decision will force legislative action

ALBANY (SURC) – A New York State Supreme Court judge in Albany ruled today that the state must support equally all students attending any public or private institution of higher learning in the state. In the ruling, unequal support based upon the institution an individual attends, was declared unconstitutional, and the existing system was charged with creating a classification "which constitutes an invidious discrimination clearly denying equal protection under the law" . . .

June 1971

4

STATE UNIVERSITY FOUND NEGLIGENT!!!
Guilty of exceeding statutory authority

ALBANY (SURC) – A New York State Supreme Court judge in Albany ruled today that the State University of New York had clearly exceeded its statutory authority under the New York Education Law, by offering curricula in excess of public demand at the expense of private institutions, and that their activities bordered on negligence. Judge S.B. Schroeder's ruling, directed to SUNY's Board of Trustees, ordered an immediate end to any curriculum offered which placed the state-supported campuses in direct competition with private colleges and universities where no real need exists . . .

July 1971

For information contact: Dr. Stuart A. Sandow
Educational Policy Research Center/
Syracuse University Research Corporation
1206 Harrison Street
Syracuse, New York 13210

1. Please send me_____(copies) Vol. 1,_____Vol. 2,_____Vol. 3,_____Vol. 4,_____(@ $1.25 per Volume. Make checks payable to Syracuse University Research Corporation.
2. I would be interested in seeing the results of a similar inquiry looking at the possible issue_____
_____
3. I think the _____(Organization or Foundation) would look favorably on supporting continued work in this area.
4. I would like to discuss this with you. Please call me at ( )_____
5. Name_____ Address _____
Title _____
6. Comments _____
_____